United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

WILBUR K. MILLER

6/22/70

6576

Summary Calendar

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,005

JANNA SILANDER WIRE,
Administratrix of the Estate of
John Nicholas Lorimer, Deceased,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

Washington, D. C. - THIEL PRESS - 202 - 393-0625

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CIVIL DOCKET

United States District Court for the District of Columbia

PARTIES	ATTORNEYS	NUMBER
		206-67
	David G. Bress	
UNITED STATES OF AMERICA	A. Patricia Frohman	ACTION FOR
	U.S. Attorneys Office	RECOVERY OF CLAIM AGAINST
vs		ESTATE
		$23,674.93
JANNA SILANDER WIRE	Fox & McGregor	TAXED COSTS
Administratrix for the Estate	John Joseph Leahy	Atty.
of John Nicholas Lorimer,	~~532 Munsey Bldg.~~	Marshal
Deceased	2011 Eye St., N.W.	Clerk
	20006	Witnesses
		tions

CIVIL DOCK

United States District Court for the District of Columbia

DATE		PROCEEDINGS	FEES
1967		Deposit for cost by	
Jan.	26	Complaint, appearance Exhibit A filed	
Jan.	26	Summons, copies (1) and copies ( ) of Complaint issued Ser 2/2/67	
Feb.	14	Answer of deft to complaint; c/m 2/13/67; Appearance of Fox and McGregor, John Joseph Leahy. filed	
Feb.	14	Calendared (AC/N) (N)	
Nov	1	Called Assistant Pretrial Examiner	

1968		
Apr.	1	First Notice Under Rule 13.
Apr.	9	Certificate of Readiness per pltff's counsel c/m 4-9-68. filed
July	22	Motion of deft. for summary judgment; P& A; P/S 7/22/68 M. C.filed
July	24	Stipulation extending time for deft. to respond to motion for summary judgment to and including August 23, 1968. filed
Aug.	23	Stipulation extending time for pltf. to answer or respond to motion for summary judgment to and including September 13, 1968. filed
Sep.	13	Motion of pltff. for summary judgment; statement of facts; P&A & statement in opposition to defts.' statement; c/m 9/13/68; M.C. filed
Sep.	27	Opposition of deft. to cross-motion for summary judgment; Statement; c/m 9-27-68. filed
Nov.	6	Motion of defendant to vacate ruling on summary judgment on November 5, 1968; P & A; p/s 11/6/68. M.C. filed
Nov	15	Order denying motion to vacate order granting summary judgment for plaintiff and denying motion of defendant for summary judgment and denying motion for hearing. (M) Robinson, J.
Dec.	3	Judgment for plaintiff in the sum of $23,674.93 plus costs against deft. (M) Robinson , J.
Dec.	4	Motion of Deft. for hearing on motion for summary judgment of deft. and to vacate order for summary judgment; P & A; Exhibits A,B,C,D; p/s 12/4/68. M.C. filed
Dec.	11	Answer of pltff. to motion for hearing on motion for summary Judgment; c/m 12/11/68. filed

1969				
Feb	10	Supplemental P&A by Deft in support of motion for a hearing and for other relief; c/m 2/10/69	filed	
Feb	10	Change of address of John J. Leahy; c/m 2/10/69; AC/N.	filed.	
Feb.	25	Order denying defendant's motion for hearing and other relief; confirming Court's orders of November 15, 1968 and December 3, 1968 and the conclusions of law stated therein. (N) (signed February 20, 1969) Robinson, J.		
Feb.	26	Answer of Pltf to Deft's supplemental P&A in support of Motion for hearing; c/m 2/19/69.	filed.	
Mar.	28	Notice of Appeal by Deft from Order of 2/25/69; copy mailed to A. Patricia Frohman. Deposit $5.00 by Lechy.	filed.	
Apr	14	Transcript of proceedings- 11/5/68 Doyne W. Spencer, reporter (Court s copy)	filed	
Apr	14	Transcript of proceedings- 1/27/69 Doyne W.Spencer, reporter (Court's copy)	filed	

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
c/o United States Attorney's Office
United States Court House
3d & Constitution Avenue, N. W.
Washington, D. C. 20001,

Plaintiff,

v.

JANNA SILANDER WIRE
Administratrix for the Estate
of John Nicholas Lorimer, Deceased
Rural Route # 1
Box 182 A
Storrs, Connecticut,

Defendant.

FILED
JAN 26 1967
ROBERT M. STEARNS, CLERK

Civil Action No.

206-'67

C O M P L A I N T

(For Recovery of Claim Against Estate)

1. This Court has jurisdiction under the provisions of Title 28, United States Code, Section 1345.

2. Plaintiff is the United States of America.

3. Defendant is the administratrix of the estate of John Nicholas Lorimer, deceased, letters of administration having been granted to her by this Court in Administration No. 116,912.

4. The estate of John Nicholas Lorimer is indebted to the United States in the amount of $23,674.93, as more fully set forth in the proof of claim docketed by the United States in the Register of Wills Office against said estate, a copy of which proof of claim is attached hereto as Exhibit "A" to be read and considered a part hereof.

5. Defendant herein as administratrix of said estate, upon being presented with the aforesaid claim by the United States of America, formally rejected said claim by letter dated October 27, 1966.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of $23,674.93 plus the costs of the action.

[Subscription Omitted in Printing]

EXHIBIT "A"

206-67

Case No. 116,912
Recorded in Docket of Claims No. 64
Folio 68

In the United States District Court
For the District of Columbia
Holding Probate Court

FILED
JAN 26 1967
ROBERT M. STEARNS, CLERK

Claim Against the Estate of
John Nicholas Lorimer, Deceased
Administration No. 116,912
Janna Silander Wire, Administratrix

Lt Colonel M. T. Bradley, Chief, Retired Pay Division, Finance Center, U. S. Army, Indianapolis, Indiana 46249, being first duly sworn upon oath, deposes and says:

1. That the estate of John Nicholas Lorimer, deceased, is indebted to the United States of America in the sum of $23,674.93, itemized as follows:

Period	Gross	Rate Due	Rate Paid	Rate O/Pmt	Total
1 Sep 50 - 30 Apr 52	$220.50	$110.25	$220.50	$110.25	$2205.00
1 May 52 - 31 Mar 55	229.32	114.66	229.32	114.66	4013.10
1 Apr 55 - 31 May 58	251.55	125.78	251.55	125.77	4779.26
1 Jun 58 - 30 Sep 63	266.64	133.32	266.64	133.32	8532.48

1 Oct 63 - 31 Aug 65	279.97	139.99	279.97	139.98	3219.54
1 Sep 65 - 31 Mar 66	292.29	146.15	292.29	146.14	1022.98
					$23,772.36
			Less unpaid retired pay for 1-20 Apr 66		97.43
			Balance Due the U. S. Government		$23,674.93

2. That Title 38 USC Sec 3203 provides that where an incompetent veteran has neither wife, child, nor dependent parent and is furnished institutional care by the Veterans Administration, that beginning the first day of the 7th calendar month following the month of admission, the retirement pay must be reduced 50%.

3. That the retired pay of Sergeant John Nicholas Lorimer, ASN R-775 970, was not reduced as required by the law cited in Paragraph 2 for the period 1 September 1950 (the first day of the 7th calendar month after his admission to St. Elizabeth's Hospital) through 31 March 1966 (the last full month prior to his death on 20 April 1966).

4. That the total amount of the overpayment of retired pay was $23,772.36. However, the deceased was entitled to retired pay for the first 20 days in April 1966 for which payment was not made, in the amount of $97.43. This credit has been set-off against the indebtedness, leaving the sum of $23,674.93 now due and owing.

FILED
MAY 25 1967
JOSEPH M. STEPHANS' CLERK

M. T. BRADLEY, Lt Colonel, FC
Chief, Retired Pay Division
Finance Center, U. S. Army

Subscribed and sworn to before me this 4th day of August 1966.

Notary Public

My Commission Expires:
January 10, 1967.

$23,674.93

~~Will pass claim when paid.~~ Attest:
/s/ Aliene M. Ivory
Deputy Register of Wills

[Caption Omitted in Printing]

ANSWER

1, 2, 3, & 5. The allegations contained in paragraphs 1, 2, 3, and 5 of the complaint are admitted.

4. The allegation of indebtedness contained in paragraph 4 of the complaint is denied. No copy of the proof of claim referred to therein was attached to the copy of the Complaint mailed to defendant.

The right of action set forth in the complaint did not accrue within three years of the commencement of this action. The plaintiff also is guilty of laches.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

DEFENDANT'S MOTION
FOR
SUMMARY JUDGMENT

The defendant, Janna Silander Wire, Administratrix of the Estate of John Nicholas Lorimer, deceased, by her attorney John Joseph Leahy, represents to this Court as follows:

1. The material facts in this case are not in dispute, as more fully set out in the appended Points and Authorities;

2. The defendant is entitled to the judgment of this Court as a matter of law, as more fully set out in the said Points and Authorities.

WHEREFORE, the defendant moves this Court, under Rule 56 of the Federal Rules of Civil Procedure, for Summary Judgment in her favor and dismissal of the plaintiff's cause of action.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

POINTS AND AUTHORITIES
IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

1. Rule 56, Federal Rules of Civil Procedure.

2. MATERIAL FACTS:

The defendant concedes and alleges the following material facts as not being in dispute:

(1) The jurisdiction of this Court and the capacity of the parties hereto.

(2) John Nicholas Lorimer, defendant's decedent, was a retired Master Sergeant of the United States Army, receiving retired pay from the Army until his death.

(3) Said John Nicholas Lorimer was adjudged incompetent to handle his financial affairs, was committed to Saint Elizabeth's hospital in the District of Columbia, and a fiduciary appointed by this Court to Administer his finances.

(4) The Veterans' Administration paid all of the decedent's charges while he remained at Saint Elizabeth's, which was until his death.

(5) Title 38 U.S.C., Section 3203, requires that when a retired veteran is receiving retirement pay and is subsequently hospitalized, for which hospitalization the Veterans' Administration pays his charges, his retired pay shall be reduced by 50% after six months' hospitalization, but not below $30.00 per month.

(6) The retired pay of the decedent was not reduced in accord with 38 U.S.C. 3203, as paraphrased above, from September 1, 1950 through March 31, 1966, or at all.

(7) The retired pay of the decedent was increased five times, namely, May 1, 1952, April 1, 1955, June 1, 1968, October 1, 1963, and on September 1, 1965.

(8) The Court-appointed Committees filed accounts with this Court for every year of the decedent's incompetence until his death, which accounts showed that the decedent was:

a) Receiving retired pay;

b) Committed to Saint Elizabeth's;

c) Making no direct payments to Saint Elizabeth's;

d) Sending copies of the accounts to the plaintiff through its agency, the Veterans' Administration, prior to Court approval.

(9) The plaintiff filed suit on January 26, 1967.

3. THEORY OF LAW:

Summary of Theory of Law:

If this case were to be adjudicated under legal principles alone (as opposed to equitable principles), the plaintiff could not recover fully because of the statutes of limitations. Since, however, the plaintiff is the United States of

America, it has the benefit of case decisions which immunize it from the efficacy of such statutes. But the case decisions are based solely on equitable policy principles in no way applicable to this case. Since the principles are not applicable to this case, the United States may not claim benefit of the case decisions.

* * * * * * * * * * *

The United States has filed a claim against the Estate of John Nicholas Lorimer, deceased, in the amount of $23,674.93, being the amount of the claimed overpayment of retired pay made to the deceased from September 1, 1950 through March 31, 1966. The Administratrix of his Estate rejected the claim as being barred by the statute of limitations, laches, and estoppel, without conceding the accuracy of the amount claimed.

Under ordinary circumstances, that is, if the parties to this action were both individuals, the plaintiff's claim for money had and received or unjust enrichment dating from 1950, would be barred by the three-year statute of limitations. D.C. Code, Section 12-301 (1967). However, since the plaintiff is the United States of America, the same code exempts the plaintiff from the above cited section. D.C. Code, Section 12-308 (1967). Cases decided in Federal courts and in the Supreme Court of the United States indicate that, generally, the sovereign is not bound by the same statutes of limitations, and theories of laches or estoppel which bind its subjects. United States v. Washington Loan and Trust Co., 47 F. Supp. 25, affirmed 77 U.S. App. D.C. 284, 134 F. 2d 59 (1942); United States v. Summerlin, 310 U.S.

414 (1940); Board of Commissioners v. United States, 308 U.S. 343 (1939); Societe Suisse Pour Valeurs de Metaux v. Cummings, 69 App. D.C. 154, 99 F. 2d 387 (1938).

A. Reasons for the Government's Immunity:

More important to this case than the general theme of the cited cases is the reasoning which supports this departure from the ordinary intent of courts to have done with "old" or "stale" litigation. The government is granted immunity from the effect of the statutes of limitations not because of any inherent divine right of kings or theory of absolute sovereignty, but because of public policy considerations which are based upon equitable considerations.

> "The true reason...is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. And th ough this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, introduced for the public benefit, and equally applicable to all governments." STORY, J., in U.S. v. Hoar, Fed. Cas. No. 15,373, p. 330. Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitation it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king. Guaranty Trust Co. v. United States, 304 U.S. 126 (1937); see also United States v. Kirkpatrick, 9 Wheat. 720; United States v. Knight, 14 Pet. 301; United States v. Thompson, 98 U.S. 486; Fink v. O'Neil, 106 U.S. 272.

The primary consideration of these cases is the interest of the citizens which the government is designed to serve. United States v. Nashville, C. & St. L. Ry., 118 U.S. 120, 125 (1886). If the government has, in its own right, a claim against an individual citizen, the cases say that it should be permitted to prosecute that claim not for its own benefit, but for the benefit of all the citizens, albeit the claim is otherwise barred to individuals in like situations. Mount Vernon Mortgage Co. v. United States, 98 U.S. App. D.C. 429, 430, 236 F.2d 724, 725 (1956); Board of Commissioners v. United States, supra; Stanley v. Schwably, 147 U.S. 508, 513 (1893); United States v. Beebe, 127 U.S. 338, 342 (1887). The body of citizens is not to be made to suffer for the mistaken or negligent acts of officers of the government. United States v. Nashville, C & St. L. Ry., supra, at 125. The government is too large and to unwieldly for superiors to be able to supervise all of the individual ministerial acts of its employees. United States v. Washington Loan and Trust Co., supra, at 286.

While it remains unsaid in the cases, the fact is clear that the body of citizens, individually, does not have the proper standing or capacity to sue for the same causes for which the government may sue. Mount Vernon Mortgage Co. v. United States, supra, at 430. The body of citizens is not in the same position as a transferee or assignee. The rights of the body of citizens are purely equitable in this regard.

Since the government sues not in its own right, but in the interest of all of its subjects for a right which is theirs only

collectively, and further since that right of the citizens is purely equitable, if that equity is overcome by one more compelling, then the rationale for the cases exempting the government from the statutes of limitations is overcome. An even stronger argument is made for the removal of the exemption when the underlying equity is removed.

Another factor which has led the courts generally to exempt the government from the effect of the statutes has been the underlying facts in the cases decided, in particular the mistaken or negligent act of the government official leading to the lawsuit. While the cases have ranged from suits over coupons to those involving Indian lands, the governmental act has been unitary. In other words, while the official may have been mistaken or negligent to the detriment of the individual citizen, his act did not engender further similar or concurrent acts of negligence either by himself or other officials. [1]

B. Exceptions to the Government's Immunity:

In direct opposition to the general theme that the government is immune from the effect of the statute of limitations and theories of laches and estoppel are the cases where the government has been held bound by such debilitating forces. Where, for example, the government had taken negotiable paper after the statute

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1. For example: Mount Vernon Mortgage v. United States, failure to sue; Societe Suisse v. Cummings, sale of confiscated property; United States v. Summerlin, failure to sue; United States v. Minnesota, 270 U.S. 181 (1926), cancellation of land patents; Board of Commissioners v. United States, failure to sue; Guaranty Trust Co. v. United States, government took over Russian account in bank; Nashville, C & St. L. Ry. v. United States, government purchased coupons.

had run, it was held bound. United States v. Nashville, C& St.L. Ry., supra, at 125. See also: Lindsay v. Miller, 6 Pet. 666; United States v. Knight, supra; United States v. Thompson, supra. Where the Commissioner of Internal Revenue had made a re-determination of tax liability after previously allowing payment under a different theory, he was held bound to his original theory even though the statute of limitations had not run on his right to make a re-determination. Vestal v. Commissioner, 80 U.S. App. D.C. 264, 152 F.2d 132 (1945). Where the United States, through its officers,had failed to provide sufficient accounting procedures to prevent issuance of checks for non-existent employees, the bank's claim of equitable estoppel in regard to the false checks was denied because the negligence of the government did not directly affect the conduct of the bank (reliance on the felonious employee's indorsement). United States v. Washington Loan and Trust Co., supra. Yet the court did say that the bank's claim was a valid plea if it had been so affected.

The most telling of the exceptions to the general rule appears where the statute has run on another person from whom the government takes its right of action. While the language in the Guaranty Trust case relates directly to an action to recover deposits of the Russian government, it is relevant here.

> As has already been noted, the rule nullum tempus rests on the public policy of protecting the domestic sovereign from omissions of its own officers and agents whose neglect, through lapse of time, would otherwise deprive it of rights. But the circumstances of the present case admit of no appeal to such a policy. There has been no neglect

> or delay by the United States or its agents, and it has lost no rights by any lapse of time after the assignment. The question is whether the exemption of the United States from the consequences of its own agents is enough to relieve it from the consequences of the Russian Government's failure to prosecute the claim. Proof, under a plea of limitation, that the 6-year statutory period had run before the assignment offends against no policy of protecting the domestic sovereign. It deprives the United States of no right, for the proof demonstrates that that the United States never acquired a right free of a pre-existing infirmity, the running of limitations against its assignor, which public policy does not forbid. Guaranty Trust Co. v. United States, 304 U.S. at 141 (1938). See also: United States v. Buford, 3 Pet. 12,30.

C. Policy Reasons for the Exceptions:

Initial reading of these two last cases might seem to indicate that this is an exception because the original claim did not belong to the government. But their underlying meaning is that there simply is no equitable reason for allowing the government a windfall, especially since the body of citizens had no interest in the original claim. Here is the obvious situation of an overriding equity which will forestall the government's immunity.

To expand: If the United States has subrogated, so to speak, to an individual's position, it has presumably expended some public assets to reach that position. Therefore, the same policy to protect the interests of the body of citizens would appear to apply -- but they do not. When the government's position as a plaintiff is derived from an individual against whom the statute of limitations (or estoppel or laches) has run, then the statute

has been held effective against the government also. This result obtains because the public originally had no interest in the rights of the government's transferror and would not, therefore, ordinarily have any interest when the transferor disposes of that right. But in the case where the government is the transferee, the consideration which passes from it to the transferror is part of the public assets. Consequently the body politic does have an interest in what disposition its representative makes of those assets.

Logically the statute of limitations should not apply against the government; nevertheless, the courts have held that the public interest in this latter situation is not so great as usual and that the statute will run against the government. Such a determination is bot based upon strictly legal principles, since all legal rights of the assignee remain unimpaired. But it is based almost completely upon an equitable consideration of public policy -- that being, where a decision must be rendered as between the disinterested citizens and an innocent individual regarding a disposition of public assets through the administrative error or negligence of the government, the courts will favor the individual as having the greater equity of the two.

Again, while it is not said in the cases, the inference in the reasoning for this favor of the individual would be some type of equitable attribution of the public servant's mistake to the public which he serves. As between the two innocent parties, equity will favor the one who has not been (indirectly) responsible for the damaging act.

D. Application to This Case:

The facts in this case lead to this type of conclusion; and they also offer a further equity to be placed on the individual's side of the scales. Not only was there the original mistake or act of negligence on the part of the government (the failure in 1950 to reduce the payments when it had all the information), but there was a continuing series of similar and related mistakes or acts of negligence. Five times the deceased's retired pay was increased, but the error was not noticed or corrected. There is the inference here that five times the deceased's file came to someone's attention and at those times the government either knew or should have known from the information supplied what the deceased's status was.

During the period when the deceased remained incompetent, his committee was required to report to this Court by means of an annual account. Copies of these accounts were sent to officers of the government as required. Local Rule 5 (e). The information in these sixteen or so accounts showed and should have been recognized by the government what the status of the deceased was. In each instance the report was approved by order of the Court, since there was no objection entered. Moreover the actual checks which transferred the funds from the plaintiff to the deceased's committee and the superintendent of the hospital were made out by and approved by the plaintiff's agents. Here again was a clear indication of the status of the deceased as an incompetent, who was receiving from the government the care he was entitled to because of his status as a veteran.

The result is that the plaintiff made not one or two mistakes or acts of negligence, but actually compounded and repeatedly fostered its own error, for which it now seeks compensation on equitable grounds.

In weighing the equities involved, the following four expenses are the most apparent damages inflicted upon the deceased's Estate by the plaintiff's mistakes or acts of negligence, all of which are beyond recovery or even determination. There was not merely passive receipt of unreduced payments by the decedent's committees. There were increased taxes paid on the basis of the amount received. There were bond premiums made larger by the fact that more money was coming into the hands of the committee through no fault of the committee or the decedent. There were commissions paid to the committees (one of whom has since died) and Auditor's fees to this Court which were based respectively on percentages of expenditures from, and the stated worth of, the decedent's Estate.

For the most part all of these payments are unrecoverable because of the same device which the government allegedly has in its favor -- the statute of limitations. If the overpayments justly and equitably belong to the government, then the causally increased percentage payments belong to the Estate. But there is no way to recover these percentage payments. Any suspicion that the deceased actually garnered more than his increased costs because of investment of the overpayments is not borne out by facts of which the Court may take judicial notice. For example: The funds had to be invested in "safe" investments and the maximum interest earned was 4%. However, the tax payments have been

14%, the committee commissions were 5%, the bond premium about 1%, and the Auditor's fees about 1%, a total of between 20% and 21%.

The 14% attributed to taxes cannot be questioned as it has been the minimum Federal Income Tax rate since 1954, a fact of which this Court will take judicial notice. Taking 20% as the absolute minimum percentage of overpayment loss to the defendant, and reducing it by 4% to allow for the interest derived, the remainder of 16% is demonstrated to be an absolute mimimum of the proportion of the alleged overpayments that have been expended as a result of the government's negligence and cannot be recovered by the Estate.

The facts herein, that is, the extent of the government's mistakes and/or negligence, put this case beyond the scope of the cases which granted the government immunity from the effects of the statutes of limitations and laches and estoppe l. And Congress has just recently indicated its feeling as far as such immunity is concerned in the past when it enacted Section 2415 of Title 28 of the United States Code. This section now provides for the imposition of a six-year statute of limitations on the government for cases involving tort, contract, and money payments. If such is th e intent of Congress f or the cases which previously did come under the immunity of the above cited decisions, certainly the intent is all the stronger for those cases which do not come within the scope of those former cases. There is, therefore, no real case law or statutory basis for exempting the United States from the strictures of the statute of limitations.

This individual case demands a weighing of the rights and equities of the whole disinterested body of citizens against the rights and equities of one innocent individual. The United States has, as the sovereign, its rights which are technical, clearly-delineated privileges guaranteed by specific enactments and decisions, but it has no equitably justifiable position. Nevertheless, the cases which grant that privilege indicate their own foundation on equities, which are considerations of the intent of the laws and the lawmakers, combined with the judgment of the arbitrators of those laws.

The servant of the whole group has acted in a way which has resulted in detriment to one individual and now seeks to recompense those who amount to his masters for his error. The government has had sixteen years or more to discover the error and has not done so until now; now when it is impossible to have his own recovery. The plaintiff's base of equity does not exist here, or at least it is substantially overcome. Consequently, its immunity from the effects of the statutes is also overcome.

E. Conclusion:

Accordingly, the defendant submits to this Court and prays that judgment may be granted under the equity powers of this Court in one of three alternative fashions:

1. Judgment for the Defendant and dismissal of the Plaintiff's cause of action;

Or

2. Judgment for the Defendant, limited to those periods covered and encompassed by the statute of limitations. (Judgment for

the Defendant for the period September 1, 1950 through January 26, 1964);

Or

3. Judgment for the Defendant limited to an equitable period of time. (Eg., Judgment for the Defendant limited to the period which would now be covered by 28 U.S.C. 2415, that is, September 1, 1950 through January 26, 1961);

And

For any and all other general and special relief as this Court may deem just and equitable.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

FILED

SEP 13 1968

MOTION OF PLAINTIFF FOR SUMMARY JUDGMENT

Plaintiff, through its attorney, the United States Attorney for the District of Columbia, respectfully moves for summary judgment on the grounds that the record herein discloses that there is no geniune issue as to any material facts and that plaintiff is entitled to judgment as a matter of law.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

The defendant, Janna Silander Wire, Administratrix of the Estate of John Nicholas Lorimer, opposes the plaintiff's cross-motion for summary judgment and in support of that objection says as follows.

The defendant admits that it has been established by judicial ruling that the United States is generally not bound by statutes of limitations or laches and that the United States may generally recover funds wrongfully, erroneously or illegally paid by its officers and agents. Both parties' points and authorities previously filed are replete with citations.

However, even the honored maxim of stare decisis has not been sufficient to forestall the courts from changing their own rulings in an appropriate case. (Consider, e.g., Erie R. Co. v. Thompkins, 304 U.S. 64 (1938); Brown v. Board of Education, 349 U.S. 294 (1955); Baker v. Carr, 369 U.S. 186 (1962).) The appropriateness of the situation for reversal of prior holdings may well be measured by the equities of the situation, since the party may not otherwise have any valid recourse to the courts. Clements v. Macheboeuf, 92 U.S. 418 (1875).

Furthermore, the only statutory basis on which the plaintiff may rely, D.C. Code 12-308, is not so absolute a provision as the plaintiff has indicated. Judicial construction of that section indicates a situation where the provision would not

be equitably applicable. United States v. Washington Loan and Trust Co., 47 F. Supp. 25, affirmed 77 U.S. App. D.C. 284, 134 F.2d 59 (1942). [Non-applicability of the provision where the action of the government directly caused the bank's loss.]

The government complains that the defense cites no cases to support is contention that the government should be barred on equitable grounds. (Plaintiff's Cross-Motion, p.3) Among others, the defendant cited United States v. Nashville, C & St.L. Ry., 118 U.S. 120 (1886), for the proposition that the body of citizens is not to be made to suffer for the mistaken or negligent acts of officers of the government; and United States v. Washington Loan and Trust Co., 47 F. Supp. 25 (1942), for the idea that government is too large and unwieldy for superiors to be able to supervise all of the individual ministerial acts of its employees. The defendant then poihted out that the constantly recurring fact pattern in these and other cited cases was one of a single erroneous act which led to the lawsuit. (Defendant's Motion for Summary Judgment, p.5, footnote 1.) The commission of only one erroneous act, rather than a continuous series, gave some factual hint as to the reasoning which developed the equity; otherwise, the government as an entity would have to plead its case on rules of law.

The defendant concluded that where the equity was overcome by a stronger equity, the status of protection which resulted from the government's (weaker) equity should concurrently be overcome because the equity failed. Such a position is hornbook law. Salem Trust Co. v. Manufacturers' Finance Co., 264 U.S. 182 (1924).

Since the plaintiff sought relief relying on a position based entirely in equity, it is not excused from the duty to do equity, albeit there is a bar to action against it. Brownley v. Peyser, 69 App. D.C. 56, 98 F.2d 337 (1938). The facts construed most favorably to suit the government's position show a long series of acts intentionally or unintentionally performed in apparent violation of 28 U.S.C. 3203. But a systematic, repeated, continuing violation of law resulting in injury presents ample grounds for equitable relief against the perpetrator. Chicago & N.W. Ry. v. Eveland, 13 F.2d 642 (1926).

Two minor points in plaintiff's cross-motion remain. First, the second paragraph of page 4 represents a conclusion, based on no indicated facts, that the interest the decedent's account earned offset the costs incurred. This conclusion not only avoids the point that only the alleged overpayment is significant here, not the whole amount; but it also omits the fact, as demonstrated in the defendant's original motion (p.10), that the net effect of the alleged overpayment was to create costs which reduced the uncontested benefits.

Secondly, the plaintiff's next paragraph on the same page refers to further provisions of Title 28 which determine distributions of withheld benefits after a veteran's death. The defendant here has made no such claim and makes none. The paragraph and its contents are irrelevant to the case at hand.

For the reasons expressed in the foregoing objections, the defendant respectfully moves that the plaintiff's cross-

motion be denied and that her own motion for summary judgment be granted.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

DEFENDANT'S STATEMENT IN OPPOSITION TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 9 (h)

Pursuant to Local Rule 9 (h), defendant denies that the party named in Plaintiff's Statement of Material Facts, paragraph nine (9), that is, Janna Silander Wire, is the only heir at law of the decedent.

Defendant affirmatively states that in addition to the said Janna Silander Wire the following persons are heirs at law (D.C. Code 19-309 and 19-701) of the decedent:

1. Robert G. Silander, grandnephew
2. John A. Silander, grandnephew
3. Marshall T. Nanninga, grandnephew

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

MOTION OF DEFENDANT TO VACATE SUMMARY JUDGMENT FOR PLAINTIFF, AND FOR ORDER GRANTING DEFENDANT A HEARING ON HER MOTION

The defendant, Janna Silander Wire, Administratrix of the Estate of John Nicholas Lorimer, deceased, moves the

Court for orders vacating the summary judgments granted in favor of the plaintiff and denying hers, entered in the absence of her counsel on November 5, 1968, and for an order reinstating her motion for summary judgment on the Motions Calendar for a hearing, and for reasons therefor states:

1. Through a misreading of the scheduled date for a hearing on her motion as it appeared on the Court Clerk's postcard, viz., November 6 rather than November 5, the stamping of which was not too clear, defendant's counsel set it up on his desk calendar and wall calendar for argument on the latter date. Not until 3:40 P.M. on November 5, when he inquired of Mr. Huey by telephone where the case stood on the motions calendar for the next day, did he learn that it had been called that morning and denied, and the plaintiff's cross-motion for summary judgment granted.

2. The matter involves a substantial sum of money, $23,674.93 to be exact, which the defendant contends belongs to the estate of the deceased, who is a ward of this Court. Although the merits of her case were set forth in the points and authorities which were filed with her motion, her counsel feels that oral advocacy would provide a sounder basis for the judicial determination it is entitled to and deserves.

3. No prejudice would accrue to the plaintiff through granting this motion; in fact it has graciously conceded that it has no objection.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

DEFENDANT'S POINTS AND AUTHORITIES IN SUPPORT OF HER MOTION TO VACATE SUMMARY JUDGMENT GRANTED IN THE EXCUSABLE ABSENCE OF HER COUNSEL

Rule 60 (b) (6) of the Federal Rules of Civil Procedure provides for relief of a party from a final judgment upon motion and upon such terms as are just for mistake, inadvertance, surprise or excusable neglect, or for any reason justifying relief from the operation of the judgment.

The relief sought is the vacating of a summary judgment granted in favor of the plaintiff on November 5, 1968, and an order denying defendant's motion for summary judgment in the absence of her counsel, the excusable circumstances of which are more fully set out in her appended motion.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

O R D E R

Upon consideration of Defendant's Motion to Vacate Summary Judgment for Plaintiff and for Order Granting Defendant a Hearing on Her Motion, and having reviewed the original motion papers and memoranda of points and authorities in support of the parties' respective motions for summary judgment, and finding that,

notwithstanding the excusable neglect of Defendant in not appearing at the oral hearing on November 5, 1968

(1) The facts in this case are undisputed, and

(2) The law is clear that the United States is not bound by the statute of limitations to assert its claim in funds wrongfully paid, and

(3) There is no legal basis on which the Court could have granted Defendant's Motion, and

(4) Plaintiff United States is entitled to summary judgment as a matter of law, it is this 15th day of November, 1968,

ORDERED that Defendant's Motion to Vacate Summary Judgment for Plaintiff be and is hereby denied, and it is

FURTHER ORDERED that Defendant's Motion to Grant Defendant a Hearing on Her Motion be and is hereby denied, and it is

FURTHER ORDERED that Defendant's Motion to Vacate the Order of this Court Denying Defendant's Motion for Summary Judgment be and is hereby denied.

Aubrey E. Robinson, Jr.
Judge

November 15, 1968
(Date)

[Caption Omitted in Printing]

FILED
DEC 3 - 1968

ORDER

The Court having entered an order herein on November 15, 1968, denying defendant's motion to grant a hearing on her motion for summary judgment and determining that plaintiff, United States, is entitled to summary judgment as a matter of law, it is by the Court this 3rd day of December, 1968,

ORDERED that judgment for the United States of America plaintiff against Janna Silander Wire, Administratrix of the estate of John Nicholas Lorimer, deceased, defendant, is hereby entered in the amount of $23,674.93 plus the costs of this action.

UNITED STATES DISTRICT JUDGE

FILED
DEC 4 1968

[Caption Omitted in Printing]

MOTION OF DEFENDANT FOR HEARING OF HER COUNSEL ON HER MOTION FOR SUMMARY JUDGMENT AND FOR OTHER RELIEF

The defendant Janna Silander Wire, by her attorney John Joseph Leahy, pursuant to Rule 60(b)(6), F.R.Civ.P., moves the Court to vacate the summary judgment granted to plaintiff and denied to defendant on November 5, 1968, in the excusable absence of her counsel, and to order an oral hearing on the parties' motions for summary judgment for the reasons set forth in the Points and Authorities appended hereto.

In the alternative, defendant, pursuant to Rule 53(b), Rule 56(c) and Rule 60(b)(1), F.R.Civ.P., moves the Court to refer the question of the amount of the defendant's liability to the Auditor of this Court for determination because of patent inconsistencies in the amount claimed by plaintiff and the amount indicated in public records as received by defendant's decedent.

[Subscription Omitted in Printing]

FILED

DEC 4 1968

[Caption Omitted in Printing]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANT FOR HEARING OF HER COUNSEL,

Rule 60(b)(6) of the Federal Rules of Civil Procedure provides: "On motion and uppn such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (6) any other reason justifying relief from the operation of the judgment."

I

Defendant and then plaintiff filed motions for summary judgment, limiting their respective contentions to issues of liability and not to the amount thereof. The motions were considered by Judge Robinson on November 5, 1968, in the excusable absence of defense counsel. (See Judge Robinson's Order, November 15, 1968, page 1.) Defendant's motion was denied and plaintiff's granted.

On November 6, 1968, defendant moved the Court to vacate the judgment of the previous day and to reinstate the motions on the claendar for hearing. Plaintiff's counsel stipulated, in writing, no objection thereto.

On November 15, 1968, the Court denied defendant's motion of November 6, 1968, to vacate and for a hearing. As a consequence defendant has been denied the opportunity of presenting her case on oral argument either in her own behalf or in opposition to the plaintiff's case. Judgment was docketed on December 3, 1968.

Defendant has been adjudged liable for a large sum of money, more than $23,000, without ever having her argument heard in open court, except in the abbreviated form of motions and memoranda.[1] Defendant has been denied the right to argue her case even though the plaintiff, as the beneficiary of such rulings, was willing to proceed in such a fashion recognizing the elemental fairness of such a procedure.

Judge Robinson's Order of November 15, 1968, indicates that it is premised on consideration of the pleadings only and not upon arguments of counsel. The defendant partially contested in memoranda, and would have contested fully on oral argument, the inapplicability of various case decisions to the facts in this action. In no manner could the written memoranda have fully apprised the Court of the defendant's contentions.

---

1. Matters involving large sums should not be determined by default summary judgment if it can reasonably be avoided and any doubt should be resolved in favor of a petition to set aside so that the case may be determined on its merits. Tozer v. Krause, 189 F.2d 242.

In Judge Robinson's same Order of November 15, 1968, he found that "there is no legal basis on which the Court could have granted Defendant's Motion." Apparently this must refer to defendant's original motion for summary judgment, since it is clear that there was discretion to grant defendant's subsequent motion on November 6, 1968. But it is precisely the application of the law that Judge Robinson must have made in denying the original motion for summary judgment which the defendant would have shown as inapplicable, if allowed to proceed.

Therefore, the defendant suggests an abuse of the Court's discretion in failing to allow oral argument when so promptly applied for and now moves the Court concurrently to:

-vacate the grant of summary judgment to plaintiff;

-vacate the denial of summary judgment to defendant;

-vacate the Order of November 15, 1968;

-order the original motions to be set down for oral argument.

Rule 53(b) of the Federal Rules of Civil Procedure provides: "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it."

Rule 56(c) of the Federal Rules of Civil Procedure, in pertinent part, provides: "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Rule 60(b)(1) of the Federal Rules of Civil Procedure provides:" On motion and upon such terms as are just, the court may relieve a party or his legal pepresentative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect...."

II

In the event that the Court is unwilling to grant the relief sought in Part I hereof, the defendant moves in the alternative to refer the question of the amount of liability to the Auditor of this Court for determination.

Recognizing that reference is the exception and not the rule, the defendant refers the Court to items of public record to indicate the necessary exceptional circumstances. Appended hereto as Exhibit A is a copy of the plaintiff's claim schedule indicating various amounts allegedly paid to defendant's decedent. Also appended hereto as Exhibits B,C, and D are copies of several (not all) pages of the Committees' accounts filed and approved in this Court in behalf of the defendant's decedent. These accounts were filed in Mental Health Number 750-51.

The Court's attention is respectfully directed to the payments allegedly made and those actually received for the months indicated. The discrepancies are apparent as this chart shows:

Period	Plaintiff's Claim (Per Month)	M.H. File (Per Month)
Oct 50 - Oct 51	$220.50	$190.50
Nov 51 - Dec 51	220.50	187.20
Jan 52 - May 52	220.50/229.32	198.30
Jul 52 - Jan 53	229.32	205.52
Jan 57 - Dec 57	251.55	226.43
Jun 65 - Sep 65	279.97/292.29	256.45
Oct 65 - Mar 66	292.29	267.05

Nor do these constitute the extent of the discrepancies. For not even one month for more than 15 years are the figures the same.

The defendant respectfully suggests that the true information is more readily available to the plaintiff through its agents and their vouchers, cancelled checks, etc.

The defendant further suggests that such a public record goes heavily in favor of her denial of liability which would have been made if allowed to orally argue as requested in Part I.

Therefore the defendant moves that this case be referred to the Auditor of this Court for determination.

[Subscription Omitted in Printing]

Fox, McGregor and John Joseph Leahy, Attys.

Case No. 116,912

Recorded in Docket of Claims No. 64

Folio 68

EXHIBIT A

Exhibit C

206-67

In the United States District Court
For the District of Columbia
Holding Probate Court

Claim Against the Estate of
John Nicholas Lorimer, Deceased
Administration No. 116,912
Janna Silander Wire, Administratrix

Lt Colonel M. T. Bradley, Chief, Retired Pay Division, Finance Center, U. S. Army, Indianapolis, Indiana 46249, being first duly sworn upon oath, deposes and says:

1. That the estate of John Nicholas Lorimer, deceased, is indebted to the United States of America in the sum of $23,674.93, itemized as follows:

Period	Gross	Rate Due	Rate Paid	Rate O/Pmt	Total
1 Sep 50 - 30 Apr 52	$220.50	$110.25	$220.50	$110.25	$2205.00
1 May 52 - 31 Mar 55	229.32	114.66	229.32	114.66	4013.10
1 Apr 55 - 31 May 58	251.55	125.78	251.55	125.77	4779.26
1 Jun 58 - 30 Sep 63	266.64	133.32	266.64	133.32	8532.48
1 Oct 63 - 31 Aug 65	279.97	139.99	279.97	139.98	3219.54
1 Sep 65 - 31 Mar 66	292.29	146.15	292.29	146.14	1022.98
					$23,772.36
			Less unpaid retired pay for 1-20 Apr 66		97.43
			Balance Due the U. S. Government		$23,674.93

2. That Title 38 USC Sec 3203 provides that where an incompetent veteran has neither wife, child, nor dependent parent and is furnished institutional care by the Veterans Administration, that beginning the first day of the 7th calendar month following the month of admission, the retirement pay must be reduced 50%.

3. That the retired pay of Sergeant John Nicholas Lorimer, ASN R-775 970, was not reduced as required by the law cited in Paragraph 2 for the period 1 September 1950 (the first day of the 7th calendar month after his admission to St. Elizabeth's Hospital) through 31 March 1966 (the last full month prior to his death on 20 April 1966).

4. That the total amount of the overpayment of retired pay was $23,772.36. However, the deceased was entitled to retired pay for the first 20 days in April 1966 for which payment was not made, in the amount of $97.43. This credit has been set-off against the indebtedness, leaving the sum of $23,674.93 now due and owing.

M. T. BRADLEY, Lt Colonel, FC
Chief, Retired Pay Division
Finance Center, U. S. Army

Subscribed and sworn to before me this 4th day of August 1966.

Notary Public

My Commission Expires:
January 10, 1967.

$23,674.93

~~Will pass claim when paid~~ Attest:

Deputy Register of Wills

EXHIBIT B

In re:

JOHN LORIMER,

Patient.

Mental Health No. 750-51

HARRY M. HULL, CLERK

FILED
DEC 4 1968
ROBERT M. SICKELS, CLERK

Exhibit
Ca
20-67

REPORT OF THE AUDITOR

On First Account filed March 20, 1953, and Report filed February 27, 1953, of Philip W. Austin, Committee.

To the United States District Court for the District of Columbia:

Having duly audited the above-mentioned account in compliance with Rule 22, the Auditor respectfully reports as follows:

1. As revised below, said account appears to be a correct statement of the Committee's receipts and disbursements from December 26, 1951, through February 27, 1953:

Dr.

Patient's U. S. Army retirement pay for calendar months of

January 1950 through September 1950, 9 months at $195.60	$1,760.40
October 1950 through October 1951, 13 months at $190.50	2,476.50
November and December 1951, 2 months at $187.20	374.40
January through May 1952, 5 months at $198.30	991.50

June 1952 including retroactive adjustment to May 1, 1952	214.34
July 1952 through January 1953, 7 months at $205.52	1,438.64

EXHIBIT C FILED

APR 15 1958

REPORT OF THE AUDITOR

On Sixth Account and Report filed February 13, 1958, of Phillip W. Austin, Committee.

To the United States District Court for the District of Columbia:

In compliance with Rule 22, the Auditor respectfully reports as follows:

1. Said account, covering the period from January 3, 1957 through December 31, 1957, has been audited and is revised as follows:

	RECEIPTS	DISBURSEMENTS
Balance per Auditor's report filed August 5, 1957	$17,709.08	
Patient's U. S. Army retirement pay for calendar months of January 1957 through December 1957, 12 months at $226.43	2,717.16	

Dividends on savings accounts as follows:

Oriental Building Association:		
June 1957	$129.55	
Dec. 1957	178.53	$308.08

3. The income collected during the accounting period amounted to $4,585.60 and consisted of the following:

EXHIBIT D

U. S. Army retirement benefits for the calendar months of June 1965 through March 1966, as follows:		
4 payments at $256.45	$1,025.80	
1 adjustment at $10.60	10.60	
6 payments at $267.05	1,602.30	$ 2,638.70
Dividends earned on savings accounts, as follows:		
Metroplis Building Association	$ 431.25	
Oriental Building Association	431.25	
Home Building Association	431.25	
Eastern Savings and Loan Association	432.87	
Jefferson Federal Savings and Loan Association	220.28	1,946.90
		$ 4,585.60

FILED
DEC 4 1968
ROBERT M. SIGMON, CLERK

4. The Successor Committee's account and report show no real estate or other personal property owned by the Patient.

5. The disbursements aggregated $3,083.31 and consisted of the following:

Beatrice Tiller, Special nursing services, per Court order of November 4, 1965	$ 2,599.00
Internal Revenue Service, Estimated income taxes (1965)	218.00
Auditor's fee re prior account	100.00
McLaughlin Company, Bond premium	29.00
Successor Committee's commission re prior account	57.31
The Superintendent of St. Elizabeths Hospital, For the Patient's personal account	80.00
	$ 3,083.31

[Caption Omitted in Printing]

FILED

DEC 11 1968

ANSWER OF PLAINTIFF TO MOTION OF DEFENDANT FOR HEARING ON HER MOTION FOR SUMMARY JUDGMENT AND FOR OTHER RELIEF

Defendant, in her motion for summary judgment, stated that the material facts in this case were not in dispute, as did plaintiff in its cross-motion. Furthermore, in its Statement of Material Facts Pursuant to Local Rule 9(h) filed in support of its cross-motion for summary judgment, plaintiff stated in paragraph 5 thereof that the amount of overpayment to the decedent was $23,772.36, which amount had been reduced to a balance due of $23,674.93. Defendant's Statement in Opposition to Plaintiff's Statement of Material Facts contained no reference or objection to the amount of overpayment set forth by plaintiff.

Now, however, after judgment, defendant has filed a motion asking for a rehearing and pointing to the fact that the monthly amounts paid to the decedent as shown by the proof of claim (a copy of which was attached to the complaint) differ from the amounts deposited into the defendant's estate according to the accounts filed in the Mental Health case.

Such difference in figures is, in fact, due to the income taxes withheld from the payments.

Plaintiff opposes vacation of the order entered by this Court denying defendant's motion for summary judgment and granting plaintiff's motion for summary judgment. However, with regard to the amount of the judgment, plaintiff is willing to stipulate that it will credit to the amount due under the judgment a sum equal to the amount of income tax paid on the overpayments.

[Subscription Omitted in Printing]

SUPPLEMENTAL POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION FOR A
HEARING AND FOR OTHER RELIEF

Defendant, Janna Silander Wire, Administratrix of the Estate of John Nicholas Lorimer, deceased, files these supplemental points and authorities in support of her Motion for a Hearing and for other relief.

This is at the request of the Court which on January 27, 1969, at 9:50 A.M., within one minute of his intended presentation of his reasons why an oral hearing should be granted, interrupted counsel, after counsel had received the following letter on the stationery of the Clerk's Office:

"January 15, 1969"

"This is to notify you that Judge Robinson will hear your motion, filed December 4, 1968, 'for a hearing on defendant's motion for summary judgment and and for other relief.' The hearing date is Monday, January 27, 1969, at 9:30 A.M....

By: Dennis Murray
Deputy Clerk"

The announced reason for the Court's interruption was that it expected counsel to present his oral argument for summary judgment. It was notaware that the subject scheduled for argument was a motion for a hearing of oral argument on its motion for summary judgment which, in the excusable absence of her counsel, and after the court had heard plaintiff's counsel, had been denied and a summary judgment for the plaintiff granted on November 5, 1968. As defendant's counsel explained to the Court, he was not prepared to present a full and adequate argument for summary judgment because (1) it was not the scheduled subject; no such motion was pending;and (2) the substantial sum at stake as well as the unusual and rather complex subject justified the expenditure of four or five hours in last minute preparation which, of course, counsel had not invested under the circumstances.

The Propriety of Granting this Motion:

1. Although a hearing on this motion is within the Court's discretion under the rule, many reasons appear why an oral hearing should be granted to avoid the possibility of impatience leading to an abuse of discretion.

Impatience with the absence of defendant's counsel at court on November 5, 1968, probably entered into the Court's rejection of its motion for summary judgment and the granting of plaintiff's cross-motion. Yet, as the court later held, that absence was excusable for it was the result of the stamped date on the Clerk's card which was not clearly legible.

This impatience no doubt was heightened by his absence from a subsequent court appointment that he knew nothing about through a telephone message that had been left by the court clerk with counsel's telephone answering service which was garbled in its transmission to him, referring to a date in February.

Finally, on January 27, 1969, when defendant's counsel began his argument on the clearly expressed and only pending motion, with counsel for both sides ready and waiting to resume the trial of a case in which they were engaged, the Court undoubtedly was ill-disposed to have these other proceedings interrupted for the better part of an hour, which this motion deserves.

It should be remembered that this defendant instituted this summary means of disposing of this case earlier than it would have been normally, thereby saving much of the court's time and reducing the case backlog by one. Her summary motion was filed last July. She consented to the plaintiff's request for an extension of time for the filing of an answer. She has done nothing really to incur the displeasure or the impatience of the Court. The plaintiff has not objected to her counsel's motion for a hearing.

2. Although this defendant represents the estate of a veteran who at the time of his death was a ward of this Court, she asks no favor or preferential treatment; but she does feel entitled to equal treatment.

The plaintiff was heard to argue its cross-motion for summary judgment while the defendant was not heard. Elemental fairness, which to its credit the plaintiff has conceded, required both sides to be heard if one is given the privilege. Local Rule 9(c) clearly states that when a hearing is allowed, equal time will be granted to each side for presentation and argument.

Summary judgment is an extraordinary remedy and should not be granted lightly. Paper Mate Mfg. Co. v. W.A. Sheaffer Pen Co., 248 F.Supp. 665 (1965). To grant such a judgment, and it should be recalled that the plaintiff actively moved for such action, having heard only one side would seem to militate against the theory that the court should consider all the information which is available to it before rendering such a decision. Brunswick Corp. v. Vineberg, 370 F.2d 72 (1965).

3. This case involves an unusual, if not unique, theory on the defendant's side. To be successful in that theory, the defense would have to distinguish carefully the underlying rationale in a long series of similar cases. The advisability of oral argument in such a situation is indicated by the remarks of Judge Steckler.

> At an oral argument, counsel are able to point up the main thrust of their positions, and may concede or soft-pedal minor points. They are also available to answer questions put to them by the court to crystallize the basic question to be decided.... In ruling upon motions in chambers, however, the judge is faced with the limitations of the printed word. He cannot ask counsel to explain or amplify a particular vague statement or argument, and may therefore misconstrue the thrust of the statement or discount a valid, though ineptly stated, argument....
>
> Steckler, Motions Prior to Trial, 29 F.R.D. 191, 299-313 at 302.

4. The purpose of Rule 78, FED. R. CIV. P., which is the source of Local Rule 9(b) and 9(f), has not been fulfilled in this case. The denial of a hearing has entended the case and added to the business of the court. Rule 78, in pertinent part, states:

> To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

When the defendant originally filed her motion for summary judgment, she complied with the local practice as set out in Local Rule 9(b) and filed a motions card which indicated an estimated time for hearing. Counsel was excusably absent from the hearing and the next day filed a motion asking to be heard. The lack of hearing has now added three months to the disposition of this case and has resulted in a situation which does not yet reach the merits of defendant's original motion for summary judgment.

For these reasons the defendant further presses her pending motion to vacate the plaintiff's summary judgment and the denial of hers and to grant an oral hearing thereon.

The Propriety of Summary Judgment for the Defendant:

Although this defendant does not concede that this memorandum is an adequate substitute for an oral hearing, at the insistence of the Court the defendant offers these additional point for the granting of summary judgment in her favor.

The Court found in this case that there is no legal basis on which it could have granted the defendant's motion for summary judgment. This movant respectfully suggests that the denial of its motion rendered final by the entry of a summary judgment . . for the plaintiff is error for two reasons.

First, it ignores the defendant's argument that the plaintiff's rights, as sovereign, are based on a statutory exemption. The case decisions cited by both sides preponderate in favor of the defendant since they reveal that, in the main, the government has been given the benefit of the exemption in instances where its negligence has been confined to isolated, individual acts of error.

The government's anomolous position that it can have the benefit of the law without c omplying with its reasonable strictures can be supported only <u>when</u> its actions will accrue a positive benefit for the public. The benefit is usually found in the services which the government is performing for all citizens. The government's position can be supported only <u>because</u> the benefits conjoined with its own unwieldiness in operation. No one group of supervisors, the cases seem to indicate, can oversee all of the multifarous operations of government. Therefore, the reasoning continues, the government will not be held to the same standards as any other party to a lawsuit. For no other reason, and especially not because of any inherent right or power, is the government so exempted. If these factors or reasons should for any reason fail, the inescapable conclusion must be that the exemption must also fail.

The plain facts in this case indicate that for sixteen years the government through its officers and agents failed to correct a situation solely of its own making. The initial error was that of the plaintiff. It conferred no benefit upon all the citizens. And while the error may have resulted from the bureaucracy of government, the record will show that it was one of the plaintiff's own officers who instigated the proceedings to have the defendant's decedent removed to St. Elizabeth's hospital. The activity was an internal function of the government with no civilian overtones and is not that type of activity which the exemption at issue here seeks to procect against. To conclude otherwise would be to say that government may dc as it pleases, when it wants to, and is answerable to no one. Obviously this is not more than a paraphrasing of the theory of the divine right of kings.

Each year for sixteen years the plaintiff was put on actual notice of its alleged overpayments when it received copies of the decedent's conservators' annual accounts. Nevertheless the payments continued and were actually increased several times. Obviously there was no benefit to the public. Indeed, were the Court at this stage to approve such actions by the government, it would be a plain indication to government employees that slipshod and sloppy work will be approved by the courts of the United States.

The actions of the plaintiff, have, in reality, been to the detriment of all citizens by allowing such conditions to continue unchecked. To allow recovery would be to reward misfeasance.

Congress has recognized the inequity of providing the government with so great a sword as well as a shield when dealing with the citizens it is supposed to serve and has therefore imposed definite limits on government's immunity. The legislative history to these 1966 amendments provides a great deal of insight to Congressional thinking on this point. The idea announced over and over is that government should be put on an even basis with those it serves.

Second, the Court's denial of defendant's motion for summary judgmentand granting of plaintiff's overlooks the inequity of the plaintiff's position whose negligence has accounted for a loss to the estate of a demonstrated absolute minimum of 16% of the alleged overpayments which were expended and are unrecoverable as a result of the plaintiff's gross negligence.

No clearer proof of the validity of this representation could be offered the court than the fact that the plaintiff now concedes that the defendant should be credited with the amount of the income tax paid on the overpayments. As commendable as said concession is, it comes only part way -- overlooking three other similar expenditures: larger bond premiums, committee commissions and higher taxes than withheld because of interest earned on the increased deposits in savings accounts. Most importantly, it concedes the thrust of the defendant's argument, namely, that it seeks equity yet it cannot do equity.

In an attempt to demonstrate its fairness and an equitable disposition, the defendant in her motion for summary judgment suggested that, if the Court saw fit, it grant her motion modified in one of theee ways which would reduce the alleged overpayments: (a) Judgment for the defendant limited to those periods covered and encompassed by the statute of limitations; i.e.,

for the period September 1, 1950 through January 26, 1964; (b) Judgment for the defendant limited to the period covered by 28 U.S.C. 2415; i.e., September 1, 1950 through January 26, 1961; (c) Judgment for the defendant for any other period reasonable in the discretion of the Court. Moreover, she suggested, if the Court was so disposed, to refer the matter to the Auditor for a determination of the appropriate off-set.

Under the circumstances it is clear that the entry of the summary judgment in favor of the plaintiff is reversable error by confession. Accordingly, the defendant insists it should be vacated and the defendant's motion for summary judgment be granted on one of the four bases suggested or that at least the defendant's counsel be given the opportunity to further aid the Court in dealing with the question on its merits.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

O R D E R

Having considered Defendant's Motion for Hearing and Other Relief and the Answer of Plaintiff to said Motion, and having held a hearing on said Motion at which time the Court expressly requested Defendant to file a supplemental memorandum on its substantive motion for summary judgment, and having received Defendant's supplemental points and authorities and Plaintiff's answer thereto, and finding nothing in Defendant's memoranda to justify changing the conclusions announced by this Court in its order of November 15, 1968, it is this 20th day of February, 1969,

ORDERED that Defendant's Motion for Hearing and Other Relief be and is hereby denied, and it is

FURTHER ORDERED that this Court's orders of November 15, 1968, and December 3, 1968, and the conclusions of law stated therein, be and are hereby confirmed.

Judge

February 20, 1969
(Date)

FILED
FEB 26 1969

[Caption Omitted in Printing]

ANSWER OF PLAINTIFF TO DEFENDANT'S SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR A HEARING AND OTHER RELIEF

In answer to defendant's supplemental points and authorities filed herein on February 10, 1969, plaintiff respectfully refers the Court to its memorandum of points and authorities filed on September 13, 1968, in support of its motion for summary judgment.

In his supplementary points and authorities, as in his previous memorandum, defendant's attorney continues to assert that the statute of limitations should be applied to the United States in the instant case because of equitable considerations. Defendant, however, has not cited any case holding that a statute of limitations can be applied to the United

States because of equitable reasons, nor do the cases which he cites even consider such a question.

On the other hand, it is well established that the United States is entitled to recover payments erroneously made to citizens without bar of any local statute of limitations. As stated by the Supreme Court in United States v. Wurts, 303 U.S. 414, 416:

> The Government's right to recover funds from a person who receives them by mistake and without rights is not barred unless Congress has "clearly manifested its intention" to raise a statutory barrier.

Counsel for the defendant claims that there is a distinction in the law between the situation where one erroneous payment by the United States or a series of erroneous payments is involved. He has cited no case so holding or even suggesting that this is the law. To the contrary, Grand Trunk Western Ry. Co. v. United States, 252 U.S. 112, involved erroneous overpayments by the Post Office Department to a railway for a period of twelve years, and in that case the Supreme Court stated, p. 121:

> It matters not how long a time elapsed before the error in making the overpayment was discovered or how long the attempt to recover it was deferred. The statute of limitations does not ordinarily run against the United States and would not present a bar to a suit for the amount.

Moreover, the District of Columbia Code in Section 308 of Title 12 specifically exempts suits by the United States

from the operation of the local statute of limitations, and Congress specifically provided in Section (g) thereof that 28 U.S.C. 2415, which establishes a six-year statute of limitations as to suits for money brought by the United States, should not apply retroactively but run from July 18, 1966, the date of enactment.

Further, with regard to defendant's claim that the estate will suffer inequities if required to pay back the overpayment because of increased expenses to the estate caused thereby, it is a matter of record that the overpayments were invested and that the estate earned interest in the amount of $13568.87. This is more than the total of the expenses paid from the estate during the period in question which amounted to $13116.74, including $3122.08 for nurses fees and the decedent's personal expenses. To allow the defendant to keep the overpayments would indeed mean a large windfall for the estate.

As we have previously stated, plaintiff is willing to credit to the amount due under the judgment a sum equal to the amount of income tax withheld on the overpayments; but for the reasons set forth above, plaintiff continues to oppose defendant's motion to vacate the judgment granted for plaintiff herein.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

NOTICE OF APPEAL TO COURT OF APPEALS
UNDER RULE 73 (b)

Notice is hereby given that Janna Silander Wire, defendant above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Order Denying Defendant's Motion for a Hearing and Other Relief entered in this action on February 25, 1969, and from the Judgment entered in this action on December 3, 1968.

[Subscription Omitted in Printing]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)
vs.) Civil Action No. 206-67
JANNA SILANDER WIRE)
Defendant)

Washington, D.C.

Tuesday, November 5, 1968

The above-entitled matter came on for hearing before The Honorable AUBREY E. ROBINSON, JR., United States District Judge, at 11:33 a.m.

APPEARANCE:

A. PATRICIA FROHMAN, Esq.
For the Government

P R O C E E D I N G S

THE DEPUTY CLERK: United States of America vs. Janna Silander Wire, Civil 206-67.

THE COURT: We have heard nothing from counsel for the defendant in this action. Is that correct?

THE DEPUTY CLERK: That is right, Your Honor.

THE COURT: I will hear you, Miss Frohman.

MISS FROHMAN: Thank you, Your Honor. The material facts in this case are not in dispute, Your Honor. We are suing the estate of a retired member of the armed forces who was erroneously paid twice the amount of retirement to which he was entitled for a period of over 16 years. The defendant has admitted that the payments were erroneously made and that the decedent was not entitled to receive them, and the only defense claimed is that the three-year statute of limitations of Title 12 Section 30 of the District of Columbia Code had run on a portion of the claim before this suit was filed.

In the defendant's brief, Your Honor, the defendant furthermore admits that it is well settled in the law that the United States is not bound by state statutes of limitations, but the defendant claims that the statute of limitations should be applied here because of equitable considerations.

However, Your Honor, the defendant has not cited

one case in the brief which holds or even deals with any situation where the statute of limitations has been held to bar the United States because of equitable reasons.

THE COURT: I doubt that the defendant can, Counsel.

MISS FROHMAN: I don't think so, Your Honor.

THE COURT: I think the contention of the Government is absolutely correct in this situation, that there is no merit to the defendant's motion for summary judgment, and the Government is entitled as a matter of law to summary judgment in this case.

MISS FROHMAN: Thank you very much, Your Honor.

(Whereupon the hearing was concluded.)

Washington, D.C.

Monday, January 27, 1969

MR. LEAHY: Good morning.

THE DEPUTY CLERK: United States vs. Janna Silander Wire, Civil Action 206-67.

MR. LEAHY: May it please Your Honor, according to the January 15, 1969, letter by Deputy Clerk Murray, this is a hearing on the defendant's motion of December 4, 1968, for a hearing on her motion for summary judgment. That motion asked the Court four things:

First, to vacate the summary judgment ruling in favor of the plaintiff arrived at by this Court on November 5th.

Secondly, to vacate the denial of the summary judgment to the defendant arrived at by the Court on that same date.

Thirdly, to vacate the Order of November 15th denying defendant's motion for a hearing.

And finally, to issue an Order for the original motions for summary judgment to be set down for argument.

The authority for this motion is Rule 60(b)(6) of the Federal Rules of Civil Procedure which reads: "On motion and upon such terms as are just the Court may relieve a party or his legal representative from the final judgment, order or proceeding for the following reasons:" The one that I think is particularly pertinent is (6): "Any other reason justifying relief from the operation of the judgment."

Your Honor, the propriety of granting this motion is fourfold:

First, the excusable absence of defendant's counsel on November 5th.

THE COURT: I think that it would be unnecessary to go into that aspect of the hearing. I think we ought to get right into the legal matter that is pending in connection with the contention that you would have advanced had there

been an oral argument after the motion for summary judgment had been entered.

MR. LEAHY: Very well, Your Honor. I maintain respectfully this morning that the importance of granting this motion for a hearing is first that the defendant has been adjudged liable for $23,000 on abbreviated points and authorities.

Secondly, the judgment is premised on the consideration of the pleadings only, not on arguments of counsel which could have enlarged upon and illuminated the questions involved.

THE COURT: Counsel,are you prepared to argue in that connection?

MR. LEAHY: For the summary judgment?

THE COURT: Yes.

MR. LEAHY: No, Your Honor. The reason for that being there are 18 cases cited in my brief in support of such motion which I need hardly say should require for appropriate and proper explanation considerable preliminary preparation, and I would want to give this matter at least four or five hours of my last minute time and consideration. Since such a hearing was not scheduled for this morning, only my motion for a hearing, I dispensed with that and prepared only for the motion at hand, which is the motion for a hearing on my motion for summary judgment.

THE COURT: I don't think then we ought to labor the point because that is the only thing the Court is interested in addressing itself to. Your representations have been consistently since the November 5th order was entered that if you had been given an opportunity to make oral representations, that there would have been certain representations that you would have made you think would have invluenced the Court with respect to supplementing the memorandum of law and the points and authorities upon which you premised your motion.

So it would seem that nothing would be advanced today, since the Court by its action has granted you the opportunity. It was my understanding that you would be prepared this morning to give to the Court additional authorities by way of argument to persuade the Court to set aside the Order of November 5th which was an Order for summary judgment.

MR. LEAHY: I can touch upon such reasons.

THE COURT: I am prepared to have them entered for the record so we can consider them in connection with the written authorities that have been submitted.

MR. LEAHY: As I have said to Your Honor, however, and I think it should be understandable and I should think it's perfectly reasonable to assume that on such a serious

argument, more time would naturally be given to its preparation than I had been able to give.

THE COURT: The Court assumed you were prepared on November 5th, and certainly were prepared by November 15th when you submitted a memorandum in opposition -- when you filed a motion to set aside the Order of November 5th, that you at that time were prepared with your argument.

MR. LEAHY: I can understand how you would assume that, Your Honor. But the record shows that I was of the opinion that that motion was set for the 6th rather than the 5th.

THE COURT: Well, be that as it may, let's assume it was the 6th, Counsel.

MR. LEAHY: Well, on the 5th the record will show that I checked with the Court to find out where I stood on the calendar the following morning, at which time I was told that it had been scheduled for that morning instead. I therefore did not proceed to give my intended argument the four or five hours of preparation that I otherwise would have.

Moreover, on taking the plain words of the letter that I received which was to the effect that this morning I would be heard on my motion of December 4th which was simply a motion for a hearing, if this were to be an argument on my motion for summary judgment, the advice could have plainly stated that.

THE COURT: Well, it would seem to the Court that at this stage of this proceeding it would be more appropriate for you to submit your arguments by way of legal memoranda directed to the motion for summary judgment.

MR. LEAHY: I can supplement the one that is on file.

THE COURT: I don't want to hold you to an oral presentation that you indicate that you are not prepared this morning to make. So it would seem that it would be far better and more orderly in the circumstances to submit your additional memoranda addressed to the additional reasons you intended to advance by way of oral argument in connection with the motion for summary judgment.

MR. LEAHY: I shall certainly do that.

THE COURT: In that connection, if you will serve a copy upon the United States Attorney's office, I will give the United States Attorney's office -- how much time would you need to respond, Miss Frohman, to any memoranda submitted?

MISS FROHMAN: Perhaps five days, Your Honor.

THE COURT: All right. Then thereafter we will set it down for hearing if need be.

MR. LEAHY: For argument?

THE COURT: If need be.

MR. LEAHY: I certainly hope that the Court will grant me that privilege.

THE COURT: Well, the Court has attempted on several occasiont to have an oral argument and come to grips with the legal contention you advance. If it is the feeling of the Court after receipt of your memoranda that additional argument is necessary, such will be granted. Otherwise the Court is going to enter an order based upon the status of the record.

MR. LEAHY: Very well. How much time may I have for the furnishing of this additional material? Ten days?

THE COURT: You know your schedule best, Counsel. Ten days?

MR. LEAHY: That will be ample time.

THE COURT: Let it be two weeks. That gives you another weekend. Two weeks from this date if you will submit your memoranda to the Court and serve a copy on the United States Attorney's office, they will have time to reply, and then we will consider whether there should be additional argument or whether we can do it on the record.

MR. LEAHY: Very well. Thank you very much.

THE COURT: You're welcome.

(Whereupon the hearing was concluded.)

[Caption Omitted in Printing]

DEFENDANT'S MOTION FOR PRODUCTION OF ADDITIONAL RECORD

The defendant Janna Silander Wire, by her attorney John Joseph Leahy, moves the Court for an order directing the Clerk of the Court to prepare as part of the record on appeal of this case certain items contained in Mental Health Action No. 750-51 in this Court, as more particularly set out in Appendix "A" hereto; and for reasons therefor the Court is respectfully referred to the Memorandum of Points and Authorities filed herewith.

[Subscription Omitted in Printing]

[Caption Omitted in Printing]

APPENDIX "A"

TO

DEFENDANT'S MOTION FOR PRODUCTION OF ADDITIONAL RECORD

(From Mental Health File No. 750-51)

1. PETITION FOR WRIT DE LUNATICO INQUIRENDO, APPOINTMENT OF COMMITTEE AND APPOINTMENT OF A GUARDIAN AD LITEM
   and
   EXHIBIT "A"
   filed May 23, 1951

2. ORDER TO APPEAR BEFORE COMMITTEE ON MENTAL HEALTH
   filed May 23, 1951

3. DECREE OF ADJUDICATION AND COMMITTMENT
   filed June 20, 1951

4. ORDER APPOINTING COMMITTEE
   filed December 26, 1951

5. REPORT OF AUDITOR (1st)
   filed April 21, 1953

6. ORDER RATIFYING REPORT
filed June 3, 1953

7. REPORT OF AUDITOR (2nd)
filed May 19, 1954

8. ORDER RATIFYING REPORT
filed June 7, 1954

9. REPORT OF AUDITOR (3rd)
filed April 15, 1955

10. ORDER RATIFYING REPORT
filed June 10, 1955

11. REPORT OF AUDITOR (4th)
filed March 30, 1956

12. ORDER RATIFYING REPORT
filed April 30, 1956

13. REPORT OF AUDITOR (5th)
filed August 5, 1957

14. ORDER RATIFYING REPORT
filed August 23, 1957

15. REPORT OF AUDITOR (6th)
filed April 15, 1958

16. ORDER RATIFYING REPORT
filed May 15, 1958

17. REPORT OF AUDITOR (7th)
filed June 18, 1959

18. ORDER RATIFYING REPORT
filed July 17, 1959

19. REPORT OF AUDITOR (8yh)
filed April 7, 1960

20. ORDER RATIFYING REPORT
filed April 26, 1960

21. REPORT OF AUDITOR (9th)
filed March 9, 1961

22. ORDER RATIFYING REPORT
Filed April 3, 1961

23. REPORT OF AUDITOR (10th)
filed May 24, 1962

24. ORDER RATIFYING REPORT
June 8, 1962

25. REPORT OF AUDITOR (11th)
filed May 15, 1963

26. SUPPLEMENTAL REPORT OF AUDITOR (Death of Committee)
filed May 20, 1963

27. ORDER APPOINTING SUCCESSOR COMMITTEE
filed June 17, 1963

28. REPORT OF AUDITOR (
filed September 27, 1963

29. ORDER (Discharging Committee; Appointing Committee)
filed October 15, 1963

30. REPORT OF AUDITOR (1st of Successor Committee)
filed December 3, 1964

31. ORDER RATIFYING REPORT
filed December 18, 1964

32. REPORT OF AUDITOR (2nd of Successor Committee)
filed December 20, 1965

33. ORDER RATIFYING REPORT
filed January 12, 1966

34. REPORT OF AUDITOR (3rd and Final of Successor Committee)
filed July 12, 1966

35. ORDER RATIFYING REPORT
filed July 27, 1966

FILED

APR 24 1969

[Caption Omitted in Printing]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR PRODUCTION OF ADDITIONAL RECORD

1. The present action arose out of a claim by the United States of America for the recovery of alleged overpayments of retirement benefits to the defendant's decedent, who was at all relevant times a ward of this Court in Mental Health Action No. 750-51. The items requested for inclusion

in the record in this case are the petition and order of committment and the reports of the auditor in the Mental Health file. The present action involves a series of financial transactions between the government and the defendant's decedent. Since these items are the only public record of suc h dealings, they are material to the defendant's presentation of her case on appeal.

2. This case was heard only on one-sided summary judgment argument by the government on November 5, 1968; and, consequently, no opportunity was presented to introduce the said items into evidence.

3. All the requested items are matters of public record and their inclusion would be for the convenience of the Court of Appeals as well as the parties.

4. The inclusion of such items would create no expense for, nor work any prejudice to, the plaintiff.

FILED

APR 24 1969

[Caption Omitted in Printing]

ORDER FOR PRODUCTION OF ADDITIONAL RECORD

In consideration of the defendant's motion for an order directing the Clerk of the Court to prepare as a part of the record on appeal of this case certain items contained in Mental Health Action No. 750-51 in this Court, as more particularly set out in Appendix "A" thereto, the points and authorities in support of said motion, and the Court being fully advised, it is by the Court this 24th day of April, 1969,

ORDERED, that the Clerk of the Court prepare as a part of the record on appeal of this case copies of the said

items set out in Appendix "A" of the defendant's motion for production of additional record for transmission to the circuit court of appeals as a supplementary record.

JUDGE

No opposition:

Assistant U.S. Attorney

[Caption Omitted in Printing]

FILED
APR 21 1953

REPORT OF THE AUDITOR

On First Account filed March 20, 1953, and Report filed February 27, 1953, of Philip W. Austin, Committee.

To the United States District Court for the District of Columbia:

Having duly audited the above-mentioned account in compliance with Rule 22, the Auditor respectfully reports as follows:

1. As revised below, said account appears to be a correct statement of the Committee's receipts and disbursements from December 26, 1951, through February 27, 1953:

Dr.

Patient's U. S. Army retirement pay
for calendar months of

January 1950 through September 1950, 9 months at $195.60	$1,760.40	
October 1950 through October 1951, 13 months at $190.50	2,476.50	
November and December 1951, 2 months at $187.20	374.40	
January through May 1952, 5 months at $198.30	991.50	
June 1952 including retroactive adjustment to May 1, 1952	214.34	
July 1952 through January 1953, 7 months at $205.52	1,438.64	
Cr.		
12/28/51 Philip W. Austin, fee as guardian ad litem and as attorney allowed by Court order of Dec. 27, 1951		$ 450.00
4/3/52 Glens Falls Indemnity Co., premium on committee's undertaking		20.00
Balance for which Committee is accountable at February 27, 1953, all cash		6,785.78
	$7,255.78	$7,255.78

2. The Committee's second account should commence with said balance forward of $6,785.78, and retirement check for calendar month of February due February 28, 1953.

3. In addition to said balance, the record indicates that the patient has funds on deposit with the Finance Office of St. Elizabeths Hospital, present amount not shown.

4. The Auditor found that the Committee had on deposit with the Bank of Commerce and Savings at February 27, 1953, the closing date of said account, the sum of $6,587.48, which is $198.30 less than the amount of $6,785.78, for which he is above found accountable. The Committee states that the difference represents a check for $198.30 inadvertently credited by the Bank to the Committee's individual account at the Bank of Commerce and Savings. Certified duplicate deposit slip evidencing the transfer of said sum of $198.30 to the committeeship bank account should be exhibited to the Auditor within fifteen days.

5. The annual income amounts to approximately $2,466.24.

6. The Committee's undertakings aggregate $6,500.00. In view of the balance held and the income being collected, the Auditor recommends that the Committee furnish an additional undertaking in the penalty of $3,500.00.

7. The Auditor recommends that the surplus cash be deposited at interest or invested in approved securities promptly.

8. The Auditor recommends that said account, as above revised, be approved, and that the Committee be allowed the following items:

Commission, 5 per cent of $470.00 collected and disbursed	$23.50
Auditor's fee, including $5.00 for verifying deposit	30.00

9. Copy of this report is being furnished the Motions Commissioner pursuant to Rule 22(c).

10. Copies of this report and notices of its filing have been mailed to Philip W. Austin, Esq., 503 F Street, N. W., Washington, D. C., and U. S. Veterans Administration, 1825 H Street, N. W., Washington, D. C.

Respectfully submitted,

Auditor.

NOTICE:

If within thirteen days after the mailing of the notice of the filing of this report, no objections are filed hereto, this report will be presented to the Motions Judge for an order approving this report and recommendations. (Rule 53(e)(2); Rule 6(e); Federal Rules of Civil Procedure.)

[Caption Omitted in Printing]

REPORT OF THE AUDITOR

On Second Account and Report filed February 24, 1954, of Philip W. Austin, Committee.

To the United States District Court for the District of Columbia:

In compliance with Rule 22, the Auditor respectfully reports as follows:

1. Said account, covering the period from February 27, 1953, through February 24, 1954, has been audited, and is revised as follows:

	Receipts	Disbursements
To balance forward as found by Auditor's report filed April 21, 1953	$6,785.78	
Patient's U. S. Army retirement pay for calendar months of:		
February 1953 through August 1953, 7 months at $205.52	1,438.64	
September 1953 through December 1953, 4 months at $205.86	823.44	
January 1954, at	208.20	
Interest on deposit with Perpetual Building Association through 12/31/53	20.51	

John L. Fletcher Company, premiums on committee's undertakings:		
6/8/53		$ 3.50
6/8/53		60.00
Auditor's fee for prior report		30.00
Balance for which Committee is accountable at February 24, 1954, all cash		9,183.07
	$9,276.57	$9,276.57

2. The Auditor found that the Committee had on deposit at February 24, 1954, the closing date of the account, the sum of $8,974.87, or $208.20 less than the amount, $9,183.07, for which he is above found accountable at February 24, 1954. The difference of $208.20 represents the U. S. Army retirement pay check for the calendar month of January 1954, due February 1, 1954, which had not been deposited by February 24, 1954. The Auditor found that the Committee had deposited on March 2, 1954, the sum of $208.20 with the Perpetual Building Association, resulting in a total balance of $9,183.07 on deposit on March 2, 1954.

3. The annual income amounts to approximately $2,500.00.

4. The undertaking is in the penalty of $10,000.00. In view of the balance held and the prospective income, the

Auditor recommends that the Committee furnish an additional undertaking in the penalty of $3,000.00.

5. The Auditor recommends that the Committee be allowed the following items:

Commission, 5 per cent of $93.50 collected and disbursed	$4.68
Auditor's fee, including $5.00 for verifying deposits	$30.00

6. Copy of this report has been furnished the Motions Commissioner.

7. Copies of this report and notices of its filing have been mailed to the Committee, Philip W. Austin, Esq., 503 Columbian Building, Washington, D. C., ~~United States Veterans Administration, 1825 K Street, N. W., Washington, D. C.~~, and The Superintendent, Saint Elizabeths Hospital, Washington, D. C.

Respectfully submitted,

Auditor.

NOTICE:

If within thirteen days after the mailing of the notice of the filing of this report, no objections are filed hereto, this report will be presented to the Motions Judge for an order approving this report and recommendations. (Rule 53(e)(2); Rule 6(e); Federal Rules of Civil Procedure.)

[Caption Omitted in Printing]

REPORT OF THE AUDITOR

On Third Account and Report filed March 16, 1955, and Corrected Third Account filed March 16, 1955, of Philip W. Austin, Committee

To the United States District Court for the District of Columbia:

In compliance with Rule 22, the Auditor respectfully reports as follows:

1. Said account, covering the period from February 24, 1954, through March 16, 1955, has been audited, and is revised below:

		RECEIPTS	DISBURSEMENTS
Balance forward per Auditor's Report on second account filed May 19, 1954		$ 9,183.07	
Patient's U. S. Army retirement pay for calendar months of February, 1954 through February, 1955, 13 months at $208.20 per month		2,706.60	
To reflect unauthorized withdrawal for loan to Committee made September 17, 1954	$750.00		
Restored January 4, 1955	750.00		

Interest thereon deposited January 4, 1955, representing approximately 3½% per annum for 109 days		$ 7.50	
Interest on building association deposits:			
Perpetual Building Association:			
7/1/54		134.25	
1/2/55		136.57	
Oriental Building Association:			
12/31/54		11.54	
Premiums on Trustee's undertakings paid to John L. Fletcher Co.:			
May 27, 1954			$ 60.00
June 15, 1954			15.00
Auditor's charge for prior report			30.00
Balance for future accounting, consisting of:			
Cash on deposit with			
Bank of Commerce	$ 231.78		
Perpetual Bldg. Assn.	9,749.21		
Oriental Bldg. Assn.	2,093.54		12,074.53
		$12,179.53	$12,179.53

2. The Auditor found that the Committee had on deposit at March 16, 1955, the closing date of the account, the sum of $12,074.53, which agrees with the amount for which he is above found accountable.

3. The income amounts to approximately $2,600.00 a year.

4. The undertakings are in the penalty of $13,000.00. In view of the balance held and the income being collected, the Auditor recommends that an additional undertaking of $2,000.00 be required.

5. One matter requires comment. The Committee lent $750.00 of trust funds to himself, and later restored it with interest as shown in the account above stated. A trustee cannot properly lend trust funds to himself. 2 Scott on Trusts, sec. 170.17. Even where secured such a loan will not be sanctioned. Veterans Adm. v. Hudson, 169 Md. 141, 179 Atl. 836. Such use of trust funds is ground for the removal of the trustee; the object of the removal being not punishment but protection of the estate against the possibility of similar use of trust funds in the future. Bogert on Trusts and Trustees, sec. 527.

6. The Auditor recommends that the Committee be allowed the following items:

Commission to Committee, 5 per cent of $105.00 collected and disbursed	$ 5.25
Auditor's fee for auditing and reporting on said account including verification of deposits	$30.00

7. Copy of this report has been mailed to the Committee, and a copy has been furnished the Motions Commissioner pursuant to the requirements of Rule 22(c).

8. Notice of the filing of this report has been delivered to the Clerk for mailing to the Committee, Philip W. Austin, Esq., 503 Columbian Building, Washington 1, D. C.

Respectfully submitted,

Auditor.

NOTICE

If within thirteen days after the mailing of the notice of the filing of this report, no objections are filed hereto, this report will be presented to the Motions Judge for an order approving this report and recommendations. (Rule 53(e)(2); Rule 6(e); Federal Rules of Civil Procedure.)

[Caption Omitted in Printing]

FILED
JRT
MAR 30 1956

REPORT OF THE AUDITOR

On Fourth Account and Report filed February 23, 1956, of Philip W. Austin, Committee.

To the United States District Court for the District of Columbia:

In compliance with Rule 22, the Auditor respectfully reports as follows:

1. Said account, covering the period from March 16, 1955, through December 31, 1955, has been audited, and found to result in a balance of $14,590.22 in cash for future accounting.

2. The Auditor found that the Committee had on deposit at December 31, 1955, the closing date of the account,

the sum of $13,910.93, which is $679.29 less than the amount for which the Committee is above found accountable. The difference consisted of three United States Army retirement pay checks for the calendar months of October through December, 1955, each in the sum of $226.43, which were not deposited in the committeeship savings account until February 10 and February 17, 1956.

3. The undertaking is in the penalty of $15,000.00. In view of the income being collected, the Auditor recommends that an additional undertaking of $3,000.00 be furnished.

4. The Auditor recommends that the Committee be allowed the following items:

Commission, 5 per cent of $115.00 collected and disbursed	$5.75
Auditor's fee for auditing and reporting on said account and verifying deposits	$30.00

5. Copy of this report has been mailed to the Committee and a copy furnished the Motions Commissioner.

6. Notice of the filing of this report has been delivered to the Clerk for mailing to Philip W. Austin, Esq., 503 Columbian Building, 416 Fifth Street, N. W., Washington, D.C.

Respectfully submitted,

Auditor.

[Caption Omitted in Printing]

REPORT OF THE AUDITOR

On Fifth Account and Report filed March 7, 1957, of Phillip W. Austin, Committee.

To the United States District Court for the District of Columbia:

In compliance with Rule 22, the Auditor respectfully reports as follows:

1. Said account, covering the period from January 1, 1956, through January 2, 1957, has been audited, and is revised below:

	RECEIPTS	DISBURSEMENTS
Balance forward as found by Auditor's report on 4th account filed 3/30/56	$14,590.22	
Patient's U. S. Army retirement pay for calendar months of January through December, 1956, 12 months at $226.43	2,717.16	
Dividends on deposits:		
Perpetual Bldg. Assn.:		
7/2/56	150.64	
1/2/57	152.91	
Oriental Bldg. Assn.:		
6/30/56	78.16	
12/31/56	103.99	

2/24/56 Credit by Bank for service charge canceled	1.00	
John L. Fletcher, premiums on undertakings:		
5/24/56		$ 60.00
5/24/56		10.00
5/24/56		15.00
Accountable balance, all cash		17,709.08
	$17,794.08	$17,794.08

2. The income collected amounted to $3,202.86.

3. The undertakings are in the penalty of $18,000.00. In view of the balance held and income being collected, the Auditor recommends that the Committee furnish an additional undertaking in the penalty of $3,000.00.

4. Said balance of $17,709.08 is reconcilable with the cash on deposit as shown in tabulation below:

Cash found on deposit to credit of Committee at 1/2/57:		
Bank of Commerce	$ 258.21	
Perpetual Bldg. Assn.	10,347.41	
Oriental Bldg. Assn.	6,877.03	$17,482.65
Plus deposit made 2/12/57 of Army check for Dec. 1956		226.43
Accountable cash balance in par. 1		$17,709.08

5. The Auditor recommends that the Committee be allowed the following items:

Commission to Committee: 5 per cent of $85.00 collected and disbursed		$ 4.25
Items included in 5th account as filed but not withdrawn from deposits at January 2, 1957:		
John L. Fletcher, premium paid 6/21/56	$15.00	
Telephone call to Mrs. Anna Silander, Miami, Florida, re approval of an operation upon patient	2.20	$17.20

(The payment of $30.00 to the Auditor included in the 5th account was not made until March 11, 1957, and should be included in the next account)

Auditor's charge for auditing and reporting on said account and verifying deposits $40.00

6. Copy of this report has been mailed to the Committee and a copy has been furnished the Motions Commissioner.

7. Notice of the filing of this report has been delivered to the Clerk for mailing to Phillip W. Austin, Esq., 503 Columbian Building, Washington, D. C., on AUG - 5 1957

Respectfully submitted,

Auditor.

NOTICE:

If within thirteen days after the mailing of the notice of the filing of this report, no objections are filed hereto, this report will be presented to the Motions Judge for an order approving this report and recommendations. (Rule 53(e)(2); Rule 6(e); Federal Rules of Civil Procedure.)

[Caption Omitted in Printing]

REPORT OF THE AUDITOR

On Sixth Account and Report filed February 13, 1958, of Phillip W. Austin, Committee.

To the United States District Court for the District of Columbia:

In compliance with Rule 22, the Auditor respectfully reports as follows:

1. Said account, covering the period from January 3, 1957 through December 31, 1957, has been audited and is revised as follows:

			RECEIPTS	DISBURSEMENTS
Balance per Auditor's report filed August 5, 1957			$17,709.08	
Patient's U. S. Army retirement pay for calendar months of January 1957 through December 1957, 12 months at $226.43			2,717.16	
Dividends on savings accounts as follows:				
Oriental Building Association:				
June 1957	$129.55			
Dec. 1957	178.53	$308.08		
Perpetual Building Association:				
March 1957 (from account 122-2338)	$ 51.73			
April 1957	25.00			
July 1957	87.72			
Oct. 1957	88.48	252.93		561.01

Auditor's fees:			
For 1955 account	$ 30.00		
For 1956 account	40.00	$	70.00
To Bank of Commerce, Photostatic copy of ledger for checking account		✓	1.38
John L. Fletcher Company, Bond premiums:			
July 1, 1957	$ 85.00		
July 21, 1957	15.00		
Aug. 6, 1957	15.00		115.00
Balance held for future accounting as of December 31, 1957			20,800.87
		$20,987.25	$20,987.25

The foregoing balance consists of cash on deposit as follows:

Oriental Building Association	$10,128.70
Perpetual Building Association	10,201.20
Bank of Commerce, Checking account	470.97
Total - - - - - - - -	$20,800.87

2. The undertakings are in the penalty of $21,000.00. In view of the present size of the estate ($20,800.87) and the collections ($3,278.17) being made, the Auditor recommends that the Committee file an additional undertaking in the penalty of $3,000.00.

3. The total amount on deposit as of December 31, 1957, the closing date of the account, was found to be $20,348.01 reconciled as follows:

Total amount on deposit as of December 31, 1957:		
Bank of Commerce, Checking account		$ 470.97
Oriental Building Association		9,675.84
Perpetual Building Association		10,201.20
		$20,348.01
Plus the following deposits on January 21, 1958 with the Oriental Building Association, representing the November and December 1957 U. S. Army retirement checks:		
January 21, 1958	$226.43	
January 21, 1958	226.43	452.86
Reconciled cash for which the Committee is found accountable in paragraph 1 hereof		$20,800.87

4. The Auditor recommends that the Committee be allowed the following items:

Commission, 5 per cent of $186.38 collected and disbursed	$ 9.32
Auditor's fee, including $8.00 for verifying deposits	$40.00

5. A copy of this report has been furnished to the Motions Commissioner, pursuant to the provisions of Rule 22 (c).

6. A copy of this report has also been furnished to Phillip W. Austin, Esq.

7. The Clerk of the Court has been furnished with notices of the filing of this report for mailing to the following on APR 15 1958:

Phillip W. Austin, Esq.,
2313 Cheverly Avenue,
Cheverly, Maryland

Respectfully submitted,

Auditor.

N O T I C E

If within thirteen days after the mailing of the notice of the filing of this report, no objections are filed hereto, this report will be presented to the Motions Judge for an order approving this report and recommendations. (Rule 53(e)(2); Rule 6(e); Federal Rules of Civil Procedure.)

REPORT OF THE AUDITOR

On Seventh Account and Report filed April 24, 1959, of Phillip W. Austin, Committee.

To the United States District Court for the District of Columbia:

In compliance with Rule 22, the Auditor respectfully reports as follows:

1. Said account, covering the period from January 1, 1958, through March 31, 1959, has been audited, and is revised below to show the correct balance for future accounting:

		Receipts	Disbursements
Balance per Auditor's report filed April 15, 1958		$20,800.87	
Patient's U. S. Army retirement pay for calendar months of January 1958 through February 1959:			
5 mos., each	$226.43	$1,132.15	
9 " "	$238.80	2,149.20	3,281.35
Dividends on savings accounts as follows:			

Perpetual Bldg. Assoc.			
Account No. 134-977:			
Jan. 1958	$89.26		
Apr. 1958	90.04		
July 1958	90.82	$270.12	
Account No. 122-2338:			
Oct. 1958	$87.50		
Jan. 1959	87.50	175.00	
Oriental Bldg. Assoc.:			
June 1958	$198.46		
Dec. 1958	187.50	385.96	
Enterprise Fed. Savings & Loan Association:			
1958	$58.50		
1959 No. 1	36.59	95.09	926.17
Auditor's fee for prior report			$ 40.00
John L. Fletcher Company, Bond premiums paid 5/27/58:			
Bond No. 514907		$15.00	
" " 546381		10.00	
" " 572345		15.00	
" " 705651		15.00	
" " 746513		15.00	
" " 644900		60.00	130.00
Balance held for future accounting as of 3/31/59			24,838.39
		$25,008.39	$25,008.39

The foregoing balance consists of cash on deposit as follows:

Enterprise Federal Savings & Loan Association	$ 4,537.42
Oriental Building Association	10,000.00
Perpetual Building Association	10,000.00
Bank of Commerce (checking account)	300.97
	$24,838.39

2. The undertakings are in the penalty of $24,000.00. In view of the present size of the estate ($24,838.39) and the collections being made ($4,207.52), the Auditor recommends that the Committee file an additional undertaking in the penalty of $5,000.00.

3. The total amount on deposit as of March 31, 1959, the closing date of the account, was found to be $24,838.39, which agrees with the cash for which the Committee is found accountable in paragraph 1 hereof.

4. The Auditor recommends that the Committee be allowed the following items:

Commission, 5 per cent of $170.00 collected and disbursed	$8.50
Auditing charge, for auditing and revising account of Committee and for this Report to the Court, including $8.00 for verifying deposits, as provided by Rule 22(d)	$45.00

5. A copy of this report has been furnished to the Motions Commissioner, pursuant to the provisions of Rule 22(c).

6. A copy of this report has also been furnished to Phillip W. Austin, Esq.

7. The Clerk of the Court has been furnished with notice of the filing of this report for mailing to the

following on JUN 3 8 1959 :

Phillip W. Austin, Esq.,
2313 Cheverly Avenue,
Cheverly, Maryland.

Respectfully submitted,

Auditor.

NOTICE:

If within thirteen days after the mailing of the notice of the filing of this report, no objections are filed hereto, this report will be presented to the Motions Judge for an order approving this report and recommendations. (Rule 53(e)(2); Rule 6(e); Federal Rules of Civil Procedure.)

FILED
APR 7 1960

REPORT OF THE AUDITOR

On Eighth Account and Report filed January 26, 1960, of Phillip W. Austin, Committee.

To the United States District Court for the District of Columbia:

In compliance with Rule 22, the Auditor respectfully reports as follows:

1. Said account, covering the period from April 1, 1959, through December 31, 1959, has been audited and is revised to more clearly state the transactions during the period, as follows:

	RECEIPTS	DISBURSEMENTS
Balance per Auditor's report filed June 18, 1959	$24,838.39	
Patient's U. S. Army retirement pay for the calendar months of March 1959 through December 1959, 10 months at $238.80	2,388.00	
Interest on savings accounts, as follows:		
Perpetual Bldg. Assoc.:		
4/1/59 $87.50		
7/1/59 87.50		
10/1/59 87.50 $262.50		
Oriental Bldg. Assoc.:		
6/30/59 $188.08		
9/30/59 100.00		
12/31/59 100.00 388.08		
Enterprise Federal Savings & Loan Association:		
6/30/59 $47.97		
9/30/59 57.04		
12/31/59 63.65 168.66	819.24	
John L. Fletcher Company, bond premiums paid as follows:		
5/29/59 $150.00		
8/12/59 5.00		$ 155.00
Superintendent, Saint Elizabeths Hospital, For Patient's personal account, paid 9/3/59		100.00
National Pipe & Tobacco Shop, Pipe tobacco and pouch claimed purchased for Patient		10.45
The Hecht Company, Shoes and sweater claimed purchased for Patient		16.26

Bond Stores, Inc., Shirts, underclothes, socks, sweater and trousers claimed purchased for Patient	$120.61	
Less refund	10.00	110.61
H. L. Hines, Two tailor-made suits claimed ordered for Patient		162.18
Reimbursement to Committee for transportation and other miscellaneous expenses		10.00
Auditing charge for prior account		45.00
Balance held December 31, 1959, for future accounting		27,436.13
	$28,045.63	$28,045.63

2. The foregoing balance held for future accounting consists of cash on deposit as follows:

Perpetual Building Association	$10,000.00
Oriental Building Association	10,000.00
Enterprise Federal Savings and Loan Association	7,244.66
Bank of Commerce	191.47
	$27,436.13

3. The undertakings are in the penalty of $29,000.00. In view of the present size of the estate ($27,436.13) and the income to be collected (approximately $3,949.84), the Auditor recommends that the Committee be required to furnish an additional undertaking in the penalty of $2,500.00.

4. The total amount on deposit as of December 31, 1959, the closing date of the account, was found to be $26,858.53, reconciled as follows:

On deposit with:

Perpetual Building Association			$10,000.00
Oriental Building Association			10,000.00
Bank of Commerce			191.47
Enterprise Federal Savings & Loan Association		$6,667.06	
Plus subsequent deposits, as follows:			
1/4/60 U. S. Army Retirement pay for calendar month of November 1959	$238.80		
1/4/60 Interest on savings account with Oriental Building Association due 12/31/59	100.00		
1/20/60 U. S. Army Retirement pay for calendar month of December 1959	238.80	577.60	7,244.66
Total amount on deposit for which Committee is found accountable in paragraph 2 hereof			$27,436.13

5. The Auditor recommends that the Committee be allowed the following items:

Commission, 5 per cent of $609.50 collected and disbursed	$30.48
Auditing charge, for auditing and revising account of the Committee	

and for this Report to the Court, including $8.00 for verifying deposits $55.00

6. A copy of this report has been furnished to the Motions Commissioner, pursuant to the provisions of Rule 22(c).

7. Copies of this report have also been furnished to:

Phillip W. Austin, Esq.,
Superintendent, Saint Elizabeths Hospital.

8. The Clerk of the Court has been furnished with notices of the filing of this report for mailing to the following on APR 7 1960:

Phillip W. Austin, Esq.,
2313 Cheverly Avenue,
Cheverly, Maryland.

The Superintendent,
Saint Elizabeths Hospital,
Washington 20, D. C.

Respectfully submitted,

Auditor.

NOTICE:

If within thirteen days after the mailing of the notice of the filing of this report, no objections are filed hereto, this report will be presented to the Motions Judge for an order approving this report and recommendations. (Rule 53(e)(2); Rule 6(e); Federal Rules of Civil Procedure.)

REPORT OF THE AUDITOR

On Ninth Account and Report filed February 20, 1961, of Phillip W. Austin, Committee.

To the United States District Court for the District of Columbia:

In compliance with Rule 22, the Auditor respectfully reports as follows:

1. Said account, covering the period from January 1, 1960, through December 31, 1960, has been audited and is revised to more clearly state the transactions during the period as follows:

	RECEIPTS	DISBURSEMENTS
Balance per Auditor's report filed April 7, 1960	$27,436.13	
Dividends on savings accounts with building and loan associations:		
Perpetual Building Association:		
1/ 2/60 $100.00		
4/ 1/60 100.00		$200.00
(Acct. closed 4/1/60)		
Oriental Building Association:		
4/ 1/60 $100.00		
6/30/60 100.00		
9/30/60 100.00		
12/30/60 100.00		400.00
Enterprise Building Association:		
4/ 1/60	$ 71.45	

Eastern Building Association:			
6/30/60	$ 90.15		
12/31/60	208.35	298.50	
Metropolis Building Assn.:			
9/30/60		225.00	$ 1,194.95
Patient's U. S. Army retirement pay for the calendar months of January 1960 through December 1960,			
12 months, each $238.80			2,865.60
Auditor's fee for prior account			$ 55.00
Glens Falls Insurance Company,			
Bond premiums;			
5/21/60	$155.00		
5/23/60	12.50		167.50
Balance held for future accounting			31,274.18
		$31,496.68	$31,496.68

The foregoing balance consists of cash on deposit as follows:

Oriental Building Association	$10,000.00
Metropolis Building Association	10,000.00
Eastern Building & Loan Assn.	10,000.00
Home Building Association	805.21
Bank of Commerce,	
Checking account	468.97
	$31,274.18

2. The undertakings are in the penalty of $31,500.00. In view of the present size of the estate ($31,274.18) and the income to be collected (approximately $4,060.55), the Auditor recommends that the Committee be required to furnish an additional undertaking in the penalty of $4,000.00.

3. The total amount on deposit as of December 31, 1960, the closing date of the account, was found to be $31,274.18 which agrees with the total cash for which the Committee is found accountable in paragraph 1 hereof.

4. The Auditor recommends that the Committee be allowed the following items:

Commission, 5 per cent of $222.50 collected and disbursed	$11.13
Auditing charge, for auditing and revising account of the Committee and for this Report to the Court, including $10.00 for verifying deposits	$55.00

5. A copy of this report has been furnished to the Motions Commissioner, pursuant to the provisions of Rule 22(c).

6. Copies of this report have also been furnished to Phillip W. Austin, Esq., and the Superintendent of St. Elizabeths Hospital.

7. The Clerk of the Court has been furnished with notices of the filing of this report for mailing to the following on MAR 9 1961:

Phillip W. Austin, Esq.,
2313 Cheverly Avenue,
Cheverly, Maryland.

The Superintendent,
St. Elizabeths Hospital,
Washington 20, D. C.

Respectfully submitted,

Auditor.

REPORT OF THE AUDITOR

On Tenth Account and Report filed February 26, 1962, of Phillip W. Austin, Committee.

To the United States District Court for the District of Columbia:

In compliance with Rule 22, the Auditor respectfully reports as follows:

1. Said account, covering the period from January 1, 1961, through January 31, 1962, has been audited and is revised to more clearly state the transactions during the accounting period, as follows:

	RECEIPTS	DISBURSEMENTS
Balance per Auditor's Report filed March 9, 1961	$31,274.18	
Patient's U. S. Army retirement pay for the calendar months of January 1961 through December 1961 -- 12 months at $238.80	2,865.60	
Dividends on savings accounts with building and loan associations:		
Oriental Building Association:		
3/31/61 $112.50		
6/30/61 112.50		
9/30/61 112.50		
12/31/61 112.50 $450.00		
Metropolis Bldg. Assn.:		
3/31/61 $212.50		
9/30/61 212.50 425.00		

Eastern Bldg. & Loan Assn.:				
6/30/61	$225.00			
12/31/61	212.50	437.50		
Home Building Association, account opened 1/18/61:				
Apr. 1961				
No. 2	$10.23			
July 1961				
No. 3	21.40			
Oct. 1961				
No. 4	32.82			
Jan. 1962				
No. 1	42.55	107.00	1,419.50	
Auditor's fee for prior report				$ 55.00
Hartford Accident & Indemnity Company, Bond premium				187.50
Balance held for future accounting as of January 31, 1962				35,316.78
			$35,559.28	$35,559.28

The foregoing balance consists of cash on deposit, as follows:

Oriental Building Association	$10,000.00
Metropolis Building Association	10,000.00
Eastern Building & Loan Assn.	10,000.00
Home Building Association	4,877.81
Bank of Commerce, checking account	438.97
	$35,316.78

2. The undertaking is in the penalty of $35,500.00. In view of the balance of assets held ($35,316.78) and the prospective annual income to be collected (approximately $4,285.10), the Auditor recommends that the Committee be required to furnish

an additional undertaking in the penalty of $4,000.00. (Rule 22(c).

3. Copy of this Report has been furnished to the Motions Commissioner pursuant to the provisions of Rule 22(c).

4. The total amount on deposit as of January 31, 1962, the closing date of the account, was found to be $35,316.78, which agrees with the total cash for which the Committee is found accountable in paragraph 1 hereof.

5. The Auditor recommends that the Committee be allowed the following items:

Commission, 5 per cent of $242.50 collected and disbursed	$12.13
Auditing charge, for auditing and revising account of the Committee and for this Report to the Court, including $10.00 for verifying deposits	$60.00

6. Copies of this report have also been furnished to:

Phillip W. Austin, Esq.,
Superintendent, Saint Elizabeths Hospital.

7. The Clerk of the Court has been furnished with notices of the filing of this report for mailing to the following on MAY 24 1962:

Eastern Bldg. & Loan Assn.:				
6/30/61	$225.00			
12/31/61	212.50	437.50		
Home Building Association, account opened 1/18/61:				
Apr. 1961				
No. 2	$10.23			
July 1961				
No. 3	21.40			
Oct. 1961				
No. 4	32.82			
Jan. 1962				
No. 1	42.55	107.00	1,419.50	
Auditor's fee for prior report				$ 55.00
Hartford Accident & Indemnity Company, Bond premium				187.50
Balance held for future accounting as of January 31, 1962				35,316.78
			$35,559.28	$35,559.28

The foregoing balance consists of cash on deposit, as follows:

Oriental Building Association	$10,000.00
Metropolis Building Association	10,000.00
Eastern Building & Loan Assn.	10,000.00
Home Building Association	4,877.81
Bank of Commerce, checking account	438.97
	$35,316.78

2. The undertaking is in the penalty of $35,500.00. In view of the balance of assets held ($35,316.78) and the prospective annual income to be collected (approximately $4,285.10), the Auditor recommends that the Committee be required to furnish

an additional undertaking in the penalty of $4,000.00. (Rule 22(c).

3. Copy of this Report has been furnished to the Motions Commissioner pursuant to the provisions of Rule 22(c).

4. The total amount on deposit as of January 31, 1962, the closing date of the account, was found to be $35,316.78, which agrees with the total cash for which the Committee is found accountable in paragraph 1 hereof.

5. The Auditor recommends that the Committee be allowed the following items:

Commission, 5 per cent of $242.50 collected and disbursed	$12.13
Auditing charge, for auditing and revising account of the Committee and for this Report to the Court, including $10.00 for verifying deposits	$60.00

6. Copies of this report have also been furnished to:

Phillip W. Austin, Esq.,
Superintendent, Saint Elizabeths Hospital.

7. The Clerk of the Court has been furnished with notices of the filing of this report for mailing to the following on MAY 24 1962:

Phillip W. Austin, Esq.,
2313 Cheverly Avenue,
Cheverly, Maryland.

The Superintendent,
Saint Elizabeths Hospital,
Washington 20, D. C.

Respectfully submitted,

Auditor.

NOTICE:

If within thirteen days after the mailing of the notice of the filing of this report no objections are filed hereto, this report will be presented to the Motions Judge for an order approving this report and recommendations. (Rule 53(e)(2); Rule 6(e); Federal Rules of Civil Procedure.)

FILED

MAY 15 1963

REPORT OF THE AUDITOR

On Eleventh Account and Report filed February 11, 1963, of Phillip W. Austin, Committee.

To the United States District Court for the District of Columbia:

In compliance with Rule 22, the Auditor respectfully reports as follows:

1. Said account, covering the period from February 1, 1962, through November 30, 1962, has been audited and found to result in a balance of $38,576.35 for future accounting, consisting of cash on deposit as follows:

Oriental Building Association	$10,000.00
Metropolis Building Association	10,000.00
Eastern Building & Loan Association	10,000.00
Home Building Association	8,137.38
Bank of Commerce (checking account)	438.97
	$38,576.35

2. The income collected during the accounting period amounted to $3,527.07 and included U. S. Army retirement pay for the calendar months of January 1962 through October 1962 at $238.80 per month, and interest on savings accounts in the sum of $1,139.07.

3. The disbursements shown in said account aggregated $267.50 and were all of an administrative nature.

4. The total amount on deposit as of November 30, 1962, the closing date of the account, was found to be $38,576.35, which agrees with the total cash for which the Committee is found accountable in paragraph 1 hereof.

5. The undertaking is in the penalty of $39,500.00. In view of the balance of assets held ($38,576.35) and the prospective annual income to be collected (approximately $4,440.00), the Auditor recommends that the Committee be required to furnish an additional undertaking in the penalty of $4,000.00. (Rule 22(c)).

6. A copy of this report has been furnished to the Motions Commissioner pursuant to the provisions of Rule 22(c).

7. The Auditor recommends that said account be approved and that the Committee be allowed the following items:

Commission, 5 per cent of $267.50 collected and disbursed	$13.38
Auditing charge for auditing account of the Committee and for this Report to the Court, including $10.00 for verifying deposits, as provided by Rule 22(d)	$70.00

8. Copies of this report have been sent by mail to the parties listed in paragraph 9.

9. The Clerk of the Court has been furnished with notices of the filing of this report to be mailed to the following on MAY 15 1963:

Phillip W. Austin, Esq.,
2313 Cheverly Avenue,
Cheverly,
Maryland.

The Superintendent,
Saint Elizabeths Hospital,
Washington 20, D. C.

Respectfully submitted,

John W. Fillin

Auditor.

NOTICE:

If within thirteen days after the mailing of the notice of the filing of this report no objections are filed hereto, this report will be presented to the Motions Judge for an order approving this report and recommendations. (Rule 53(e)(2); Rule 6(e); Federal Rules of Civil Procedure.)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

In re:

JOHN LORIMER,

Patient.

Mental Health No. 750-51

Supplemental Report of the Auditor on Eleventh Account and Report filed February 11, 1963, of Phillip W. Austin, Committee.

To the United States District Court for the District of Columbia:

The undersigned Auditor, John W. Follin, for report to the Court in the above-entitled proceeding, respectfully states as follows:

1. The Report of the Auditor on the Eleventh Account and Report filed February 11, 1963, of Phillip W. Austin, Committee, was filed herein on May 15, 1963. Subsequent to the filing of said report the Auditor has been advised of the death of Phillip W. Austin, Committee, on May 2, 1963.

2. A review of this file by the Auditor shows that this Mental Health case was commenced on May 23, 1951, by the

filing of a Petition for Writ De Lunatico Inquirendo; Appointment of Committee and Appointment of Guardian ad Litem, by F. J. Fitzgerald, Chief Attorney, Veterans Administration, on behalf of Carl R. Gray, Jr., Administrator of Veterans Affairs. The said petition stated that John Lorimer, Patient herein, had no relatives within the jurisdiction of the District of Columbia. By Court order dated July 13, 1951, Phillip Austin, Esq., was appointed guardian ad litem to represent said John Lorimer, Patient in the proceedings, for the appointment of a committee of his estate. The guardian ad litem's report filed herein on December 5, 1951, states that said guardian ad litem communicated with Mrs. A. I. Silander, 1545 E. 60th Street, Chicago, Illinois, who stated that she was a niece of said Patient and that she and her brother, Thomas J. Nanninga, 6946 S. Paxton Avenue, are the only living relatives of the said John Lorimer. Court order of December 26, 1951, appointed Phillip W. Austin Committee of the estate of John Lorimer.

3. In view of the death of said committee, the Auditor is of the opinion that immediate steps should be taken to protect the Patient's estate which at present is in the total amount of $38,576.35. The Auditor has been informed that the deceased Committee, Phillip W. Austin, does not have and will not have a personal representative of his estate to take action for the

appointment of a successor committee. Also, the Patient has no relatives in this jurisdiction, although it appears from the record that a niece and nephew of said Patient reside in Chicago, Illinois. The Auditor has contacted the Veterans Administration with a view toward having the Veterans Administration file the necessary proceedings to have a successor committee appointed. However, the Auditor has been advised that the Veterans Administra- has no interest in this mental health case and will take no action.

4. It appears to the Auditor that in the best interest of preserving and administering said patient's estate it is necessary that a successor committee be appointed forthwith to take over the handling of the patient's estate, and such action is recommended.

5. In lieu of the recommendation of the Auditor in paragraph 5 of said report filed herein on May 15, 1963, that the former committee, Phillip W. Austin, now deceased, be required to furnish an additional undertaking in the penalty of $4,000.00, the Auditor recommends that the successor committee be required to furnish an undertaking in the penalty of $43,500.00, conditioned for the faithful performance of his trust.

6. The Auditor further recommends that the matter be referred to the Auditor of this Court to state the final account of Phillip W. Austin, deceased committee.

7. In all other respects the information contained in the report of the Auditor filed herein on May 15, 1963, remains the same.

8. Copy of this report has been furnished the Motions Commissioner.

Respectfully submitted,

John W. Follin
Auditor.

REPORT OF THE AUDITOR

To the United States District Court for the District of Columbia:

The undersigned Auditor, John W. Follin, for report to the Court in the above-entitled proceeding, respectfully states as follows:

1. The said proceeding is before the Auditor pursuant to an order of Court entered May 21, 1963, reading in part as follows:

> "Upon consideration of the supplemental report of the Auditor filed herein on May 20, 1963, it is this 21st day of May, 1963,

ORDERED that this matter is referred to the Auditor of this Court to state the final account of Phillip W. Austin, deceased Committee."

2. By Court order of June 17, 1963, A. Noble McCartney was appointed Successor Committee of the estate of John Lorimer upon filing an undertaking with approved surety in the penal sum of $45,000.00.

3. In order to determine the final accountability of the deceased Committee, it was necessary for the Auditor to correspond with the Metropolis Building Association, the Home Building Association, the Eastern Savings and Loan Association and the Oriental Building Association. Data from other sources was also obtained in order to state the deceased Committee's accountability for the period from December 1, 1962 through June 17, 1963.

3. From the information and data thus obtained, the Auditor states below the Twelfth-and-Final Account of Phillip W. Austin, deceased Committee:

TWELFTH-AND-FINAL ACCOUNT STATED BY THE AUDITOR ON BEHALF OF PHILLIP W. AUSTIN, DECEASED COMMITTEE.

Dr.

Accountable balance per Report of the Auditor filed May 15, 1963		$38,576.35
U. S. Army retirement pay for the calendar months of November 1962 through May 1963, 7 months at $238.80		1,671.60
Interest on savings accounts:		
Oriental Building Association	$212.50	
Home Building Association	183.38	
Eastern Savings and Loan Association	318.75	
Metropolis Building Association	212.50	927.13

Cr.

Accountable balance	$41,175.08	$41,175.08
	$41,175.08	$41,175.08

5. The foregoing accountable balance of $41,175.08 has been taken over by the Successor Committee as evidenced by his Sixty-Day Report filed herein on August 9, 1963. Said balance consists entirely of cash and is held by the Successor Committee, as follows:

Home Building Association	$10,000.00
Eastern Savings and Loan Association	10,000.00
Metropolis Building Association	10,000.00
Oriental Building Association	10,000.00
Union Trust Company	1,175.08
	$41,175.08

6. Of the balance listed as on deposit with the Union Trust Company in paragraph 5 hereof, $438.97 represents funds previously on deposit with the Bank of Commerce taken over by the Successor Committee and $736.11 represents income for which the deceased Committee is accountable which was collected and deposited by the Successor Committee as stated in his Sixty-Day Report filed August 9, 1963.

7. The undertaking is in the penalty of $45,000.00. In view of the balance of assets held ($41,175.08) and the prospective annual income to be collected (approximately $4,700.00), the Auditor recommends that the Successor Committee be required to furnish an additional undertaking in the penalty of $1,000.00. (Rule 20(a) and Rule 22(c) as amended July 1, 1963.)

8. A copy of this report has been furnished to the Motions Commissioner, pursuant to the provisions of Rule 22(c).

9. The Auditor recommends that the account as stated by him on behalf of the deceased Committee, be approved and that the Successor Committee be allowed the following items:

To the Estate of Phillip W. Austin, deceased Committee:		
Commission, 5 per cent of $41,175.08	$2,058.75	
Commission previously recommended but not deducted by the deceased Committee	128.37	$2,187.12

To John W. Follin, Auditor:
For all services under the
Order of Reference and for
this Report to the Court ..... $ 115.00

10. Upon approval of the Report of the Auditor by the Court, order to be prepared and presented by the Successor Committee; the deceased Committee, Phillip W. Austin, and his surety shall stand discharged, except as to prior defaults if any.

11. Copies of this report have been sent by mail to all parties listed in paragraph 12.

12. The Clerk of the Court has been furnished with notices of the filing of this report to be mailed to the following on _____:

A. Noble McCartney, Esq.,
1025 Connecticut Ave., N. W.,
Washington 6, D. C.

Mrs. Phillip W. Austin,
2313 Cheverly Avenue,
Cheverly, Maryland

District Commissioners,
District Building,
Washington 4, D. C.

The Superintendent,
St. Elizabeths Hospital,
Washington 20, D. C.

Respectfully submitted,

John W. Follin
Auditor.

N O T I C E

If within thirteen days after the mailing of the notice of the filing of this report, no objections are filed hereto, this report will be presented to the Motions Judge for an order approving this report and recommendations. (Rule 53(e)(2); Rule 6(e); Federal Rules of Civil Procedure.)

REPORT OF THE AUDITOR

On First Account and Report filed June 29, 1964, of A. Noble McCartney, Successor Committee.

To the United States District Court for the District of Columbia:

In compliance with Rule 22, the Auditor respectfully reports as follows:

1. Said First Account, covering the period from June 18, 1963, through June 21, 1964, has been audited and found to result in a balance of $42,273.99 for future accounting, consisting of the following:

Cash on deposit:

Home Building Association	$10,000.00
Eastern Savings and Loan Association	9,472.19
Metropolis Building Association	10,000.00
Oriental Building Association	10,000.00
Jefferson Federal Savings and Loan Assn.	2,039.19
Union Trust Company (checking account)	762.61
	$42,273.99

2. The collections during said accounting period amounted to $4,723.20 and consisted of the following:

Interest on savings accounts	$1,674.07
Refunds	70.88

U. S. Army retired pay for calendar months of June 1963 through May 1964:

4 payments at $238.80	$ 955.20	
5 payments at $250.74	1,253.70	
3 payments at $256.45	769.35	$2,978.25

3. The disbursements during said accounting period amounted to $3,624.29 and were as follows:

A. Noble McCartney, Guardian ad litem fee, per Court order of 6/24/63	$ 207.24
Estate of Philip W. Austin, per Auditor's Report ratified 10/15/63	2,187.12
Federal and D. C. income taxes	564.93
Auditing charge re prior account	185.00
Bond premiums	480.00

4. The undertakings of the Successor Committee are in the aggregate penalty of $46,000.00. In view of the balance of assets held ($42,273.99) and the prospective annual income to be collected (approximately $4,900.00), the Auditor recommends that the Successor Committee be required to furnish an additional undertaking in the penalty of $1,500.00. (Rules 20(a) and 22(c), as amended July 1, 1963.)

5. A copy of this report has been furnished to the Motions Commissioner, pursuant to the provisions of Rule 22(c).

6. The total amount on deposit as of June 21, 1964, the closing date of the First Account, was found to be $42,273.99,

which agrees with the total cash on deposit for which the Successor Committee is found accountable in paragraph 1 hereof.

7. The Auditor recommends that said account be approved, and that the Successor Committee be allowed the following items:

Commission to the Successor Committee:
5 per cent of $3,624.29
collected and disbursed $181.21

Auditing charge for auditing First Account of the Committee and for this Report to the Court, including $15.00 for verifying deposits, as provided by Rule 22(d) $95.00

8. Copies of this report have been mailed to the parties listed in paragraph 9.

9. The Clerk of the Court has been furnished with notices of the filing of this report for mailing to the following on DEC 3 - 1964:

A. Noble McCartney, Esq.,
1025 Connecticut Avenue, N. W.,
Washington 36, D. C.

District Commissioners,
District Building,
Washington 4, D. C.

The Superintendent,
Saint Elizabeths Hospital,
Washington 20, D. C.

Respectfully submitted,

Auditor.

REPORT OF THE AUDITOR

On Second Account and Report filed July 6, 1965 of A. Noble McCartney, Successor Committee.

To the United States District Court for the District of Columbia:

In compliance with Rule 22, the Auditor respectfully reports as follows:

1. Said account, covering the period from June 22, 1964 through June 21, 1965, has been audited and is revised to show the correct amount of income received during the accounting period, as follows:

Dr.

Balance per Auditor's Report filed December 3, 1964		$42,273.99
U. S. Army retirement benefits for the calendar months of June 1964 through May 1965, 12 months at $256.45 each		3,077.40
Dividends earned on savings accounts, as follows:		
Metropolis Building Association	$425.00	
Oriental Building Association	425.00	

Home Building Association	418.75	
Eastern Savings and Loan Association	404.65	
Jefferson Federal Savings and Loan Association	113.04	1,786.44

Cr.

Internal Revenue Service, Federal Income taxes	$ 545.34
D. C. Treasurer, District of Columbia Income taxes	77.65
McLaughlin Company, Bond premium	247.00
Auditor's fee re prior Report	95.00
Successor Committee's commission re prior Report	181.21
Balance held June 21, 1965 for future accounting	45,991.63
	$47,137.83

The foregoing balance held June 21, 1965 for future accounting, consists of cash on deposit as follows:

Metropolis Building Association	$10,000.00
Oriental Building Association	10,000.00
Home Building Association	10,000.00
Eastern Savings and Loan Association	9,876.84
Jefferson Federal Savings and Loan Association	3,152.23
Union Trust Company, Checking account (reconciled)	2,962.56
	$45,991.63

2. The Successor Committee's account and report show no real estate or other personal property owned by the Patient.

3. The undertaking is in the penalty of $47,500.00. In view of the balance of assets held ($45,991.63) and the prospective annual income to be collected (approximately $4,866.00), the Auditor recommends that the Successor Committee be required to furnish an additional undertaking in the penalty of $3,500.00. (Local Court Rules 20(a) and 22(c).

4. A copy of this Report has been furnished to the Motions Commissioner, pursuant to the provisions of Local Court Rule 22(c).

5. The total amount on deposit as of June 21, 1965, the closing date of the account, was found to be $46,149.43, subject to an erroneous deposit on November 17, 1964 to the estate checking account in the amount of $157.80, which represents personal funds of the Successor Committee, resulting in a reconciled balance of $45,991.63, which agrees with the amount on deposit for which the Successor Committee is found accountable in paragraph 1 hereof.

6. The Auditor recommends that said account be approved, as revised, and that the Successor Committee be allowed the following items:

Commission, 5 per cent of $1,146.20 collected and disbursed	$57.31

Auditing charge, for auditing and revising account of the Successor Committee and for this Report to the Court, including $15.00 for verifying deposits, as provided by Rule 22(d) $100.00

7. Copies of this Report have been sent by mail to all parties listed in paragraph 8.

8. The Clerk of the Court has been furnished with notices of the filing of this Report to be mailed to the following on DEC 20 1965:

A. Noble McCartney, Esq.,
1875 Connecticut Ave., N. W.,
Washington, D. C. 20009

District Commissioners,
District Building,
Washington, D. C. 20004

The Superintendent,
St. Elizabeths Hospital,
Washington, D. C. 20020

Respectfully submitted,

John W. Doar

Auditor.

N O T I C E

If within thirteen days after the mailing of the notice of the filing of this report, no objections are filed hereto, this report will be presented to the Motions Judge for an order approving this report and recommendations. (Rule 53(e)(2); Rule 69(e); Federal Rules of Civil Procedure.)

REPORT OF THE AUDITOR

On Third-and-Final Account and Report filed June 13, 1966 of A. Noble McCartney, Successor Committee.

To the United States District Court for the District of Columbia:

In compliance with Rule 22, the Auditor respectfully reports as follows:

1. The Patient, John N. Lorimer, died on April 20, 1966 and Letters of Administration upon his estate were issued by the Probate Division of this Court on June 2, 1966 to Janna Silander Wire in Administration Case No. 116,912.

2. Said account, covering the period from June 22, 1965 through April 20, 1966, has been audited and found to result in a balance of $47,493.92, consisting of cash on deposit as follows:

Metropolis Building Association	$10,000.00
Oriental Building Association	10,000.00
Home Building Association	10,000.00
Eastern Savings and Loan Association	10,309.71
Jefferson Federal Savings and Loan Association	5,872.51
Union Trust Company, Checking account	1,311.70
	$47,493.92

3. The income collected during the accounting period amounted to $4,585.60 and consisted of the following:

U. S. Army retirement benefits for the calendar months of June 1965 through March 1966, as follows:		
4 payments at $256.45	$1,025.80	
1 adjustment at $10.60	10.60	
6 payments at $267.05	1,602.30	$ 2,638.70
Dividends earned on savings accounts, as follows:		
Metroplis Building Association	$ 431.25	
Oriental Building Association	431.25	
Home Building Association	431.25	
Eastern Savings and Loan Association	432.87	
Jefferson Federal Savings and Loan Association	220.28	1,946.90
		$ 4,585.60

4. The Successor Committee's account and report show no real estate or other personal property owned by the Patient.

5. The disbursements aggregated $3,083.31 and consisted of the following:

Beatrice Tiller, Special nursing services, per Court order of November 4, 1965	$ 2,599.00
Internal Revenue Service, Estimated income taxes (1965)	218.00
Auditor's fee re prior account	100.00
McLaughlin Company, Bond premium	29.00
Successor Committee's commission re prior account	57.31

The Superintendent of St. Elizabeths Hospital, For the Patient's personal account	80.00
	$ 3,083.31

6. The undertaking is in the penalty of $51,000.00.

7. The total amount on deposit as of April 20, 1966, the closing date of the account, was found to be $47,493.92, which agrees with the amount on deposit for which the Successor Committee is found accountable in paragraph 2 hereof.

8. The Auditor recommends that said account be approved and that the Successor Committee be allowed the following items:

Commission, 5 per cent of $50,577.23 collected and disbursed and to be disbursed	$2,528.86
Auditing charge for auditing account of the Successor Committee and for this Report to the Court, including $15.00 for verifying deposits, as provided by Rule 22(d)	$ 105.00

9. After payment of the foregoing items, totaling $2,633.86, there will remain a balance of $44,860.06 in cash to be disbursed and turned over by the Successor Committee to Janna Silander Wire, Administratrix.

10. After confirmation of the Report of the Auditor, order to be prepared and presented by the Successor Committee, and after full settlement and distribution has been made and a verified statement to that effect filed with the Clerk of the Court as provided by Local Court Rule 22(g), together with vouchers, receipts or canceled checks evidencing final distribution, the Auditor recommends that the Successor Committee and his surety stand discharged, except as to prior defaults, if any.

11. Copies of this Report have been mailed to all parties listed in paragraph 12.

12. The Clerk of the Court has been furnished with notices of the filing of this Report to be mailed to the following:

A. Noble McCartney, Esq.,
1875 Connecticut Ave., N. W.,
Washington, D. C. 20009

District Commissioners,
District Building,
Washington, D. C. 20004

The Superintendent,
St. Elizabeths Hospital,
Washington, D. C. 20020

Respectfully submitted,

John W. Fallin

Auditor.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,005

JANNA SILANDER WIRE,
Administratrix of the Estate of
John Nicholas Lorimer, Deceased,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JOHN JOSEPH LEAHY
800 Monroe Building
Washington, D.C. 20006
Counsel for Appellant

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,005

JANNA SILANDER WIRE,
Administratrix of the Estate of
John Nicholas Lorimer, Deceased,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

QUESTIONS PRESENTED

1. Whether the theory that the United States government is not bound by local statutes of limitations is an absolute rule or a flexible one because it is based solely on equitable principles?

2. Whether the factual situations in the cases supporting the government's exemption from the statutes of limitation are so far

distinguishable from the facts in this case as to eliminate the reasons for the rule?

3. Whether the district court abused its discretion to the prejudice of the appellant by refusing to allow any oral argument by the appellant on her motion for summary judgment after allowing the government to argue its opposition thereto and its own cross-motion for summary judgment?

4. In the alternative, whether the government's concession of the defendant's right to offset certain tax payments from the judgment granted opens the judgment to revision?

5. Further in the alternative, whether the district court in light of the government's concession of the defendant's right to offset certain tax payments erred to the prejudice of the defendant in refusing to refer the case to the auditor for a determination?

STATEMENT PURSUANT TO LOCAL APPELLATE RULE 8(d)

This case has not previously been before this Court under this or any other title.

REFERENCES TO RULINGS

The district court's basis for the order complained of by the appellant in Arguments I, II, and III is set forth in its order dated and filed November 15, 1968. (J.A. 27).

The district court did not set forth the basis for its order of February 20, 1969 denying the alternative relief requested by appellant (Argument IV).

Because of the summary procedure invoked in this case below, there are no further references.

STATEMENT OF FACTS

This is an action by the United States to recover alleged overpayments of retirement benefits paid to a veteran institutionalized at St. Elizabeths Hospital.

For more than sixteen years prior to this action the United States made regular payments of retirement benefits to the deceased, John Nicholas Lorimer, a retired master sergeant of the U.S. Army. In 1951 the deceased was, on motion of the Chief Attorney of the Veterans Administration, declared incompetent to handle his affairs and was committed to St. Elizabeths Hospital in the District of Columbia at the expense of the Veterans Administration. (J.A. 6). A committee was appointed to manage his financial affairs and account thereon to the court below. (J.A. 9). By law the committee and his successors were required to file and did file copies of their annual accounts with the Veterans Administration. Local Rule 5(e), Rules of the United States District Court for the District of Columbia.

At the time of the deceased's confinement, the law required and still requires that when a person receiving retirement benefits from the U.S. Army is placed in an institution such as St. Elizabeths Hospital and the Veterans Administration pays his expenses thereat, his retirement benefits shall be reduced by 50% during the course of his stay in the institution. 38 U.S.C. 3202. At no time from the deceased's admission until his death at the Hospital on April 20, 1966, did the United States reduce the amount of the deceased's retirement benefits. At least five times the monthly amount paid to the deceased was increased at the sole instance of the United States. (Table "A", appended hereto.)

After the deceased's death his great-niece, Janna Silander Wire, appellant herein, on June 13, 1966, procured letters of administra-

tion over the estate of the deceased from the court below, being Administration No. 116,912. The United States filed a claim against the estate in the amount of $23,674.93 as the alleged amount of overpayment, and the appellant rejected the claim. The United States filed its complaint on January 26, 1967.

The appellant moved for summary judgment on July 22, 1968. (J.A. 7). After several extensions (J.A. 2), the appellee filed a cross-motion for summary judgment. (J.A. 21). Through a clerical mishap in the district court clerk's office, appellant's counsel was misinformed of the day of the hearing on the motions and consequently did not appear in court that day. Although the district court styled counsel's failure to appear as neglect, it did state it to be excusable. (J.A. 28). While the district court permitted appellee's counsel to argue its motion orally and granted judgment thereon, (J.A. 29), it refused repeated attempts by the appellant to allow her counsel to argue. (J.A. 29, 41, 47).

The district court explicitly stated in its order of November 15, 1968, granting judgment that the United States was not bound by statutes of limitations and that there was no legal basis on which it could have granted appellant's motion. (J.A. 28). The judgment was entered on the docket on December 3, 1968.

The first of appellant's motions to vacate the order and to allow a hearing was filed on the day after the government argued its case. (J.A. 25). The latest motion requesting the right to an oral argument, was scheduled for a hearing by the district court on January 27, 1969. At that time the court instructed appellant's counsel to argue the merits of his motion for summary judgment, (J.A. 42) which instruction was a clear misconception of its own announced intention to hear only argument on the right to a hearing on the merits. Appellant's counsel understandably declined to argue

because of lack of preparation on that point. The court requested a supplemental memorandum from appellant's counsel on that point which was seasonably filed. (J.A. 41). The government filed a reply thereto conceding the appellant's right to offset income tax payments. (J.A. 48).

Appellant's motion of December 4, 1968, (J.A. 29) was denied by the district court on February 20, 1969, and entered on the docket on February 25, 1969. From the judgment entered on December 3, 1968, and the denial of the last mentioned motion, the appellant noted this appeal on March 27, 1969.

SUMMARY OF ARGUMENT

Appellant administratrix contends that the exemption of the sovereign from the operation of statutes of limitations is a rule based solely on considerations of protecting public interests. This rule has developed over the years from the individual fact patterns in the cases announcing this rule. When neither the public interests nor the public treasury will be protected by enforcing the rule, and when an individual will be irreparably injured by such enforcement, the courts in good conscience should not give it effect. When the government makes continual mistakes for sixteen years and then seeks to avoid their effect by shielding itself with the exemption, it does not serve the public interests which are of paramount importance in allowing the exemption.

Appellant further contends that when a trial judge allows one party to present its argument in a case and does not allow the opposing party to argue its own case, the trial court has committed a grave abuse of discretion. Allowing only one side to plead a case does not even comport with minimal notions of fair play or concepts of justice.

While the appellant contends that the above arguments are sufficient in themselves to warrant a reversal of the judgment below, in the event the court is unwilling to grant such a reversal, she also offers an argument in the alternative. The government's negligence in this case is unquestioned. When the district court refused to take that fact into consideration in rendering its judgment, it both computed the amount owing to the government incorrectly and again abused its discretion in not referring the matter to the auditor for a determination. The government has already offered to allow the appellant to offset certain amounts from the judgment rendered, but these amounts do not coincide with the facts which are a matter of public record. The facts presented a complicated financial and factual pattern which can best be rectified by the auditor.

ARGUMENT

I

SINCE THE GOVERNMENT'S EXEMPTION FROM THE STATUTES OF LIMITATIONS IS BASED STRICTLY ON CONSIDERATIONS OF PUBLIC POLICY, THE GOVERNMENT'S REPEATED NEGLIGENCE OVER A PERIOD OF SIXTEEN YEARS PRECLUDES ENFORCEMENT OF THE EXEMPTION IN THE CASE.

The United States, as sovereign, is generally exempt from the intended effect of statutes of limitations. *United States v. Washington Loan and Trust Co.*, 47 F.Supp. 25, affirmed 77 U.S.App.D.C. 284, 134 F.2d 59 (1942). In this country that exemption is not based upon any antique considerations of the divine right of kings. *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1937). The exemption is based solely and exclusively on considerations of public policy. *United States v. Hoar*, Fed. Cas. No. 15,373, p. 330.

The relevant policy considerations are basically two: (1) the size of the government's operation; and (2) the public interests which the government serves. Courts have held that the government of

the United States is too large to be managed effectively. *United States v. Washington Loan and Trust Co.*, 77 U.S.App.D.C. 284, 286. Therefore, these courts have held, it is improper to expect the government to act within any reasonable time limits to correct negligent actions of its agents. *United States v. Nashville, C. & St.L. Ry.*, 118 U.S. 120, 125 (1886). Although an individual may be placed in a difficult situation because of the effect of the government's actions, the whole body of citizens thereby theoretically benefits. *Mount Vernon Mortgage Co. v. United States*, 98 U.S.App.D.C. 429, 430, 236 F.2d 724, 725 (1956).

Appellant contends that such policy reasons are equitable in nature; and, being equitable, they are susceptible of modification or revision as the situation demands. A party may otherwise have no recourse at law. *Clements v. Macheboeuf*, 92 U.S. 418 (1875). Because the government relies on a position of equity, it must also do equity. *Brownley v. Peyser*, 69 App.D.C. 56, 98 F.2d 337 (1938). The government's systematic violation of the law in this instance is grounds for equitable relief. *Chicago & N.W. Ry. v. Eveland*, 13 F.2d 442 (1926).

While the operation of the government is admittedly large, in this case it had a multitude of interlocking controls which gave it actual notice that incorrect payments were being made. The government, which was already making payments to the deceased, petitioned the court below to adjudge the deceased incompetent. (J.A. 60). The government requested that the deceased be confined to St. Elizabeths Hospital. *Id.* The government made all payments on the deceased's behalf directly to the superintendent of the Hospital. The government continued its retirement payments. The government increased the payments at least five times by its own records. The government required annual accounts from the committees. And the government without exception approved the accounts for sixteen years.

Although the District of Columbia Code §12-308 exempts the government from the operation of the statute of limitations in the District of Columbia (D.C. Code §12-301), the cases which have construed Section 308 indicate that the provisions are not absolute. *United States v. Washington Loan and Trust Co., supra.*

As opposed to prior cases supporting the government's claim to unwieldiness, this is a case where the government asked to be informed of the deceased's status and was given that information. Compare the situation in *Grand Trunk W. Ry. v. United States*, 252 U.S. 112 (1919), where the United States merely made payments for carrying the mails without requiring the railroads to continually verify their status as non-land grant roads.

Compare also the government's informed decisions to approve the accounts, issue further checks and make increases in the retirement benefits in this case with its lack of knowledge of its agents' activities in loaning government money to one another for personal use in *United States v. Buford*, 3 Pet. 12 (1830).

The other policy consideration which has previously supported the government's exemption is one which "forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *United States v. Nashville C. & St.L. Ry.*, 118 U.S. at 125. Appellant fully supports this policy but strongly contends that for this court to uphold the district court in this case would violate that policy.

The policy, stated in positive terms, is one of protecting public interests from harm from within the government. When the cases announce it fully, rather than in passing reference by citation, they do so in terms of "public interests" and not merely public funds. *United States v. Nashville, C. & St.L. Ry., supra; Guaranty Trust Co. v. United States,* 304 U.S. at 141. The body of citizens has just as

valid an interest in seeing that its government is operated efficiently, where it can be, as in seeing that its treasury is not plundered by felons. When observable and correctable mismanagement is present, and such mismanagement brings a case before the courts, it is illogical for the court to protect the miscreants at the expense of the people they are serving.

If this court does not reverse, it puts its stamp of approval upon practices which have already and will continue to result in the wasting of public funds through litigation to recover other funds which would not have been paid out if any degree of care had been used. If this court does not reverse, the people of the United States will receive $23,000 for the use of all 200,000,000 of them. At the same time they will also receive the dubious benefit of the court's approval of a system of mismanagement. The intent of the courts in refusing to apply statutes of limitations against the government was to avoid just such a situation.

> The true reason . . . is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers. *United States v. Hoar*, Fed. Cas. No. 15,373, p. 330.

The government has continually complained in memoranda to the court below that the appellant cites no case in support of the foregoing theories, and the appellant admits to finding none that so hold in similar terms. But the lack of a case directly in point has not been a hinderance to the progress of the law; only a court which regards *stare decisis* as a complete, absolute and unalterable rule is hindered in devising equitable relief.[1]

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[1] In response to the general problem which the appellant faces, Congress enacted 28 U.S.C. § 2415 which imposes a six year statute of limitations on the government. Since that section is prospective by its terms, the appellant cannot rely on it alone to withstand the government's claim. However, the legislative

As noted, the government's equity, its duty of protecting the public interests, is by no means absolute. In *United States v. Nashville, C. & St.L. Ry., supra,* the Court in referring to commercial paper said:

> They [the United States] take such paper subject to all the equities existing against the person from whom they purchase at the time when they acquire their title; and cannot therefore maintain an action upon it, if at that time all right of action of that person was extinguished, or was barred by the statute of limitations. *Id.* at 125.

In that case the government had presumably consumed some public funds or transferred realty or personalty in order to acquire the paper, yet the Court held that the government was not to have exemption from the statute of limitations in such situations.

The flexibility and uncertainty of the government's exemption appears analogously in the *Guaranty Trust* case. In a case involving millions of dollars, the Court said that the government lost no right in not having the exemption since it acquired its position from another person. Notwithstanding how it acquired its position, the United States is still the sovereign and would ordinarily have its exemption. But these two cases indicated that there are elements other than sovereignty to be considered.

Since the government is equally as negligent in failing to discover defenses underlying commercial paper as in failing to perform

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history of that section (1966 U.S. Code Cong. and Adm. News, p. 2502) emphasizes three points: (a) the exemption was judge-made law; (b) it produced more inequity than justice; (c) it should be done away with as soon as possible. The appellant contends that it would be in keeping with the spirit of the legislation for the courts to develop within their equity powers avenues of avoidance in proper cases to insure that justice which jurists intended in announcing the exemption does come to pass.

a timely audit, the rationale supporting the exemption from the statute, *vel non*, must be a weighing of the equities. "[C]ourts of equity in general recognize and give effect to the statute of limitations as a defense to an equitable right, when at law it would have been properly pleaded as a bar to a legal right." *United States v. Beebe*, 127 U.S. 338 at 347 (1887).

Also illustrative of the process of weighing the equities is *United States v. Washington Loan and Trust Co.*, 77 U.S.App.D.C. 284, 134 F.2d 59 (1942). The United States had issued checks to non-existent employees of a CCC camp whose names had been supplied by a fraudulent employee. He cashed the checks at the defendant bank and was later convicted. The government sued the bank to recover the funds paid and was allowed to proceed notwithstanding a plea of the statute of limitations. In affirming the recovery the court indicated that the bank could not withstand the action because it had not relied on the government's negligence, but on the indorsement of the employee. The court indicated, however, that the result might be opposite if there had been reliance on the government's action other than issuing the checks. *Id.* at 286.

II

THE CASES SUPPORTING THE GOVERNMENT'S IMMUNITY FROM THE OPERATION OF THE STATUTE OF LIMITATIONS ARE SO DISTINGUISHABLE FROM THE FACTS IN THIS CASE AS TO BE OF NO VALUE AS PRECEDENTS FOR ALLOWING RECOVERY.

The cases supporting the judge-made rule upon which the government relies have concerned individuals injured by a single act of the government, *United States v. Kirkpatrick*, 9 Wheat. 720 (1824), as opposed to a plethora of actions; individuals with a right of indemnification for corollary losses, *United States v. Beebe*, 127 U.S.

338 (1887), as opposed to no possibility of recovery; and government policy that worked no lasting harm on the public, *United States v. Sanborn*, 135 U.S. 272 (1889).

In *Kirkpatrick* the government sued the sureties on a tax collector's bond after the statutory period had run. The government was allowed to proceed. The single reason announced by the case for the government's failure to sue within the limit was that it had not made an audit when the defendant's term of office had expired. In *Grand Trunk W. Ry. v. United States*, 252 U.S. 112 (1919), the government had originally failed to classify the defendant's predecessor in interest correctly as a land-grant railroad and subsequently made payments for carrying the mails on that incorrect basis. The United States has previously cited this case as an example of multiple erroneous acts by the government where recovery has been allowed, but the appellant contends that the emphasis is misplaced. The payments were correct but based on an incorrect assumption of status. In this case the actions of the government were incorrect although the government knew the correct status of the veteran.

In this case the government acted incorrectly not once, as in *Grand Trunk*, but many times to the detriment of the appellant. Each time the committees' annual accounts were filed, they had to be acted on. Each time an increase was made in retirement benefits, the deceased's file had to be acted on. Payment could not have been made to St. Elizabeths Hospital without authorization of someone within the government who knew that the deceased was in the Hospital. Each mistake compounded the previous errors and should have made them easier to observe over a sixteen year period.

The deceased's estate suffered losses in at least three categories as a direct result of the government's negligence. These losses are not now recoverable because of the effect of the statute of limitations and the government's delay. The deceased paid higher income

taxes because of the overpayments. The commission paid to the last committee was inordinately large when he filed his final account and transferred all the assets to the appellant since the estate had been increased by the government's actions. (J.A. 116). Sureties charged increased premiums to secure the estate assets. All of these payments were made before the estate was notified of the government's claim, and many if not all are barred by the statute of limitations. This situation is contrasted with *United States v. Beebe, supra,* where the heirs at law knew of their rights well prior to the entry of the United States into the action as a party on their behalf.

Any intimation that the estate was able to earn increased interest on the overpayments which would offset these charges is patently untrue for two reasons. Because only the overpayment is in issue, (1) the income tax rate on the overpayment is higher than any commercial interest rate on the same amount; and (2) the tax rate is progressive, that is it increases as the taxable amount increases, while the investment rate remains unchanged.

The district court's approval of the government's procedures herein condones and encourages mismanagement by refusing to apply the statutes of limitations. Although the tardy government was permitted to recover a commission erroneously paid to a tax agent in *United States v. Sanborn, supra,* no lasting effect was suffered since the government would have incurred a similar expense in collecting the tax through its ordinary employees and agents.

III

THE DISTRICT COURT ABUSED ITS DISCRETION BY REFUSING TO HEAR BOTH PARTIES IN THIS CASE AFTER ALLOWING THE GOVERNMENT TO ARGUE ITS MOTION

The motions practice in the court below allows for oral arguments. To that end the clerk of the court provides cards which are filed with the various motions. Rule 9(b), Rules of the United States District Court for the District of Columbia. These cards have a space for counsel to indicate whether or not a hearing is being requested and what is his estimation of the time necessary to argue. Appellant's counsel filled out and filed such a card requesting a hearing when his original motion for summary judgment was filed.

As indicated, appellant's counsel was misinformed of the date set for the requested hearing and was excusably absent. Appellee's counsel was permitted to argue orally its own cross-motion for summary judgment and its motion was granted. (J.A. 52). When the district court repeatedly thereafter refused to vacate its judgment and allow appellant's counsel to argue, it acted in direct contravention of its own Rule 9(c) which grants equal time to argue to both sides. Although the appellant took the initiative in awakening a case left dormant by the government and twice agreed to allow the government time to plead (J.A. 2), she has been prevented from arguing her own motion or defending against that of the government by the capricious actions of the district court.

The district court's action neither comported with nor served the purpose of Rule 78, FED. R. CIV. P., which states that:

> To expedite its business, the court may make provision by rule or order for the submission without oral hearing upon brief written statements or reasons in support and opposition.

When the district court allowed the appellee government to argue it had to allow the appellant to argue under its own rules. When the district court refused to allow the appellant to argue it was not expediting its business but adding to it by forcing the appellant into a prolonged procedural battle to attempt to secure her rights.

The argument which the appellant has sought in vain to plead orally contains certain unusual qualities which may more readily be explained in open court. In its repeated refusals the district court precluded itself from hearing all the relevant material in this case.

> At an oral argument, counsel are able to point up the main thrust of their positions, and may concede or soft-pedal minor points. They are also available to answer questions put to them by the court to crystallize the basic question to be decided. . . . In ruling upon motions in chambers, however, the judge is faced with the limitations of the printed word. He cannot ask counsel to explain or amplify a particular vague statement or argument, and may therefore misconstrue the thrust of the statement or discount a valid, though ineptly stated argument. . . .
>
> Steckler, *Motions Prior to Trial*, 29 F.R.D. 191, 302.

Even the government recognized the basic fairness of allowing the appellant her day in court. After the district court granted appellee's cross-motion for summary judgment, the appellee stipulated that it had no objection to appellant's motion to vacate and for a hearing, which was filed on the next day after the original hearing. (J.A. 26).

Summary judgment is an extraordinary remedy and should not be granted lightly. *Paper Mate Mfg. Co. v. W. A. Sheaffer Pen Co.*, 248 F. Supp. 665 (1965). The court should make use of all the information available to it. *Brunswick Corp. v. Vineberg*, 370 F.2d 72 (1965).

For the reason that the government's exemption from the effect of the statute of limitations is not applicable in this case because of the government's lack of an equitable position, that this case is markedly distinguishable from prior cases which have enforced the exemption in its particular facts, and that the district court abused its discretion in failing to hear both sides of the case, the appellant respectfully requests this court to reverse the judgment entered in the district court for the United States and to enter judgment for the appellant Janna Silander Wire, Administratrix of the Estate of John Nicholas Lorimer.

IV

In the event that the court is unwilling to grant the relief requested, the appellant respectfully makes the following argument in the alternative.

THE AMOUNT OF JUDGMENT ENTERED BELOW SHOULD BE VACATED AND THE CASE REMANDED TO THE AUDITOR FOR A DETERMINATION OF THE PRECISE AMOUNT OWING TO THE UNITED STATES IN VIEW OF THE APPELLEE'S CONCESSION REGARDING INCOME TAXES.

The government's concession to the appellant on the matter of income taxes paid (J.A. 41), indicates the inaccuracy of the amount of the district court's judgment. It also keeps open the questions regarding other losses suffered as a direct result of the government's negligence. The deceased was required to pay income taxes on the benefits which he received. 38 U.S.C. 3101; *Hoeppel v. Westover*, 79 F. Supp. 794 (D.C. Cal. 1948). Regardless of whether or not the tax payments were withheld from the benefit checks, the fact remains that the income tax rate on the total payments was greater than it would have been without any overpay-

ments. The income tax rate is progressive, that is, it increases as the taxable amount increases.[2] As a consequence of this statutory scheme the tax which the deceased paid on the amounts he was unquestionably entitled to receive was higher than it would have been had he received only the correct amount. If the estate is to be required to repay the overpayments, it must also be able to recover the excess payments of tax which decreased the amount the deceased was entitled to receive.

When the last of the deceased's committees filed his final account after the death of the decedent, he was paid a commission on the total amount which he turned over to the appellant as the personal representative of the deceased. (J.A. 116). This commission was based on the total amount of funds in the estate. Since this total was larger than it should have been, his commission was concurrently larger than it should have been. Nor is this amount capable of immediate computation for the same reasons as alleged in the previous paragraph. The base amount of the estate was inaccurate because of the errors in payment and taxation, and these errors affected the computation of the commission.

In addition to these two items, the public records in Mental Health File No. 750-51, in the court below, clearly indicate that the deceased did not receive the amounts which the government alleged in its complaint were paid. Administratrix made this fact clear to the district court in the exhibits which it attached to its motions. (J.A. 18).

In Table A, *infra,* the monthly payments as alleged by the government are compared with the amounts received by the deceased's

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[2]For example, the net income tax for a single taxpayer with no dependents who earns $1,200 is $197.50 or 14.8%. The tax on $2,400 is $420 or 17.5%. 26 U.S.C. § 1.

committees. Even a casual reading of the table indicates that the figures do not correspond for even one month. The government alleges payment of $5,582.88 more than was actually received.

If the immediate answer to this discrepancy is, as the government has previously claimed, that the tax was withheld before payment, such an answer does not solve two other questions: (a) the cause of the vast fluctuation in amounts received as compared to amounts allegedly paid;[3] and (b) the reasons for changes in amounts received at times other than those at which the government made its increases in the deceased's benefits.[4]

In failing to recognize such obvious discrepancies which were before it when ruling on the last of appellant's motions (the government's concession was filed February 19, 1969, and the court's final order was signed on February 20, 1969), the district court abused its discretion in not referring the matter to the auditor for a financial investigation as requested by the appellant. (J.A. 30). Although a referral is the exception and not the rule, Rule 53(b), FED. R. CIV. P., this case does in this respect present a complicated financial pattern in determining the precise amount owed to the government.

Even though the United States may not be held estopped because of statutes of limitations, the fact of its negligence remains

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[3]There are six (6) different monthly sums allegedly paid by the government, while the accounts in Mental Health File 750-51 show fifteen (15) different monthly sums paid.

[4]The government allegedly changed the rate of payment five (5) times, i.e., in 1952, 1955, 1958, 1963, and 1965. The Mental Health file shows substantial changes in four (4) years, i.e., 1953, 1956, 1958, and 1965.

uncontested. The district court, therefore, while deciding questions of liability could not reasonably have presumed that the government's figures were correct. The appellant has consistently argued that the government's actions have caused losses to the estate. The appellant has never conceded the accuracy of the amount claimed by the government (*see* Defendant's Motion for Summary Judgment, (J.A. 20), but sought a determination of liability only. Under the Federal Rules of Civil Procedure, Rule 65(c), the court may grant summary judgment on the issue of liability only. When it became apparent to the district court, as it must have, that there was a substantial question regarding the amounts involved, the court should have re-opened the amount of the judgment or withheld summary judgment until the factual dispute had been rectified. 2 Moore's Federal Practice 56.17 [18] citing *Bamberger Broadcasting Services v. William Irving Hamilton, Inc.*, 33 F. Supp. 273 (D.C. S.D. N.Y. 1940).

Therefore, the appellant respectfully requests in the alternative that this court remand the case to the district court with directions that the case be referred to the auditor for a determination of the precise amount owing to the government.

JOHN JOSEPH LEAHY
Attorney for Appellant

TABLE A

DATES	NO. PAYMENTS	COMPLAINT	(TOTAL)	M. H. FILE	(TOTAL)
9-50	1	$220.50	$ 220.50	$195.60	$ 195.60
10-50–12-50	3	220.50	661.50	190.50	571.50
1-51–10-51	10	220.50	2,205.00	190.50	1,905.00
11-51–12-51	2	220.50	441.00	187.20	374.40
1-52–4-52	4	220.50	882.00	198.30	793.20
5-52	1	229.32	229.32	198.30	198.30
6-52	1	229.32	229.32	214.34	214.34
7-52–12-52	6	229.32	1,375.92	159.85	959.10
1-53	1	229.32	229.32	159.83	159.83
2-53–8-53	7	229.32	1,605.24	205.52	1,438.64
9-53–12-53	4	229.32	917.28	205.86	823.44
1-54–12-54	12	229.32	2,751.84	208.20	2,498.40
1-55–3-55	3	229.32	687.96	208.20	624.60
4-55–12-55	9	251.55	2,263.95	208.20	1,873.80
1-56–12-56	12	251.55	3,018.60	226.43	2,717.16
1-57–12-57	12	251.55	3,018.60	226.43	2,717.16
1-58–5-58	5	251.55	1,257.75	226.43	1,132.15
6-58–12-58	7	266.64	1,866.48	238.80	1,671.60
1-59–12-59	12	266.64	3,199.68	238.80	2,865.60
1-60–12-60	12	266.64	3,199.68	238.80	2,865.60
1-61–12-61	12	266.64	3,199.68	238.80	2,865.60
1-62–12-62	12	266.64	3,199.68	238.80	2,865.60
1-63–9-63	9	266.64	2,399.76	238.80	2,149.20
10-63–12-63	3	279.97	839.91	250.74	752.22
1-64–2-64	2	279.97	559.94	250.74	501.48
3-64–12-64	10	279.97	2,799.70	256.45	2,564.50
1-65–8-65	8	279.97	2,239.76	256.45	2,051.60
9-65	1	292.29	292.29	10.60	10.60
10-65–12-65	3	292.29	876.87	267.05	801.15
1-66–3-66	3	292.29	876.87	267.05	801.15
			$47,545.40		$41,962.52

$47,545.40
(-)41,962.52
$ 5,582.88